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CURRENT EVENTS.

TRUSTS — PARTNERSHIP — CORPORATION.— Much interest is felt in professional circles concerning the precise legal *status* of certain organizations styled "trust companies," and much more among business men as to their actual operations. The subject has been recently discussed in the columns of a contemporary[1] by a learned and well known author, Mr. Stimson, who has evidently given much thought to the subject.

Viewing the matter, as we should, only from a professional stand-point, it strikes us that the organization of these companies is an attempt to evade alike the laws relating to partnership and corporations, the personal liability of partners, and the very inconvenient doctrine of *ultra vires*, which circumscribes the active operations of corporations. The object for which the ingenuity of lawyers has been exerted seems to be to create a third class of artificial persons which shall be exempt from the limitations which encompass the others. On this subject, however, we are feeling our way in the dark. So far as we have observed there has been little litigation and few or no adjudications relating to the organization and operation of these companies; they scrupulously keep their own counsel, and, therefore, little is known of them except by their results. We think, however, that the present calm is but "the torrent's stillness ere it dash below;" that as these companies multiply, dissensions will arise, disaster will occur, disclosures will be made, and then we will know a deal more about them than we know now. Even as we write, a newspaper lies before us, from which it appears that the holders of trust certificates in one of them are exceedingly indignant because certain promised dividends are not forthcoming, and demand investigations and disclosures.

As to the legal character of these companies, so far as we are informed as to their organization, we can see no reason why they are not partnerships, pure and simple. It is of the very essence of a partnership at common law, that he who shares the profits must needs share the losses, and is a partner. To avoid the necessity of sharing the losses, statutes authorizing limited partnerships have been enacted, and private corporations by thousands authorized. Now, these companies act under no limited partnership statute, nor claim to be chartered by any general or special corporation law. They seem to act in the spirit of the profane old distich:

> "And if we cannot alter things,
> By ——— we'll change their names."

They call their companies "trusts," their directors "trustees," their stockholders "holders of trust certificates," or in law lingo "*cestui que trustent*," and thus they hope to form partnerships without the personal liability of partners for debts, or corporations without the disagreeable incidents of visitation and investigation, and the application of the writ in the nature of *quo warranto* and of the doctrine of *ultra vires*.

So far as the partnership branch of this inquiry is concerned, it can hardly be brought to a test until some one of these "trusts" shall come to grief financially, until its trustees shall demonstrate by flight to Canada that they have been overmuch trusted, and hungry creditors rage around the land seeking somebody whom they can hold responsible for their losses. Then, unless we are greatly mistaken, the holders of trust certificates will discover that they have been partners all the time of their connetcion with the "trust," and that their certificates represent neither property nor profits, but simply liability to make good the losses which creditors may have suffered by reason of the defalcations or mismanagement of the trustees. We have already intimated that this whole subject is *res integra* in the courts. There is one case, however, now pending which, when decided, will throw some light upon it. That is the case of the State of Louisiana v. The Cotton Oil Trust, which is a bill in equity, charging that the defendant was not an incorporated company, but an association of individuals, acting under se

[1] Harvard Law Review, 133.

cret by-laws, that its purpose and object was to secure to itself the control and monopoly of all the cotton seed, cotton seed oil, oil cake, etc., in Louisiana, and to that end had secured the control of certain corporations of that State, and discriminating rates of freight in favor of its property from many lines of transportation. The prayer of the bill is for a permanent injunction against the association from doing business in the State, that it be adjudged guilty of usurpation, intruding into and exercising the privileges of a corporation without having been duly incorporated, that it be debarred from exercising any privileges as a corporation within the State, and be adjudged an illegal and fraudulent association. To this bill the defendant demurred, the demurrer was overruled, and the cause stands for an answer.

"This is a very pretty quarrel as it stands," if, in so grave a matter, we may use Sir Lucius O'Trigger's phrase, and we would not presume to prejudge it. We would remark, however, that the defendant, if it assumes the port and dignity of a corporation, stands upon a much worse footing than it would if it contented itself with the more modest *status* of a partnership or association. The State of Louisiana has an undoubted right to regulate, license, tax and control the operations of corporations of other States within its borders. In the case of insurance companies, States usually require deposits of bonds to secure policyholders and otherwise exercise surveillance over such corporations. If the answer of the defendant should state that it was altogether a mistake to suppose that it was or pretended to be a corporation at all, that the name was a mere trade name, that in fact the parties interested were A, B and C, who held in trust large sums of money for various persons, too numerous to mention, for whose benefit and their own they were acting. Upon this state of facts we cannot see why, under the ruling of the Supreme Court of the United States in the case of Robbins v. Taxing District,[2] the company or Messrs. A, B, and C, being citizens of Ohio or any other State, could not do in Louisiana anything that any citizen of Louisiana could do, nor why they could not buy all the cotton seed in Louisiana, if they had money or credit enough, and send it whithersoever they chose by any line of carriers that would take it.

Whether what the defendant company did, or was charged with doing, was the creation of a monopoly, and was for that reason or otherwise illegal, is too broad a question to be discussed at the latter end of an article, but we will return to the subject in a future number.

In conclusion, we think that a so-called "trust" must be either a corporation, duly and publicly chartered by a State or Territory, or it is a partnership, and every person who shares in the profits is a partner, and liable to third persons as such.

[2] 7 S. C. Rep. 592.

NOTES OF RECENT DECISIONS.

TRUST — RESULTING TRUST — STATUTE OF OF LIMITATIONS.—It has recently been held in Indiana[1] that the statute of limitations will begin to run against a resulting trust from the time that the trust is openly disavowed by the trustee. The facts were that in 1850 the appellants furnished John Ward, the intestate of the appellee, with money, which, with money of his own, he invested in land. The land being sold after Ward's death, by the order of the proper court for the payment of his debts, the appellants claimed that, by their advance of part of the purchase money, a trust resulted in their favor for that money, or a due proportion of the land. The administrator relied on the statute of limitations, and the court said that there were many authorities sustaining the proposition that, even before a disavowal by the trustee of a resulting trust, the statute of limitations will run against it.[2] The court, however, declined to rest its decision wholly on these authorities, as it found that it appeared from the evidence, not only that John Ward in his life-time had expressly disavowed the resulting trust, and that this dis-

[1] Ward v. Harvey, 12 N. E. Rep. 399.

[2] Newsom v. Board, 103 Ind. 526; s. c., 3 N. E. Rep. 163; Smith v. Calloway, 7 Blackf. 86; Musselman v. Kent, 33 Ind. 452; Wood on Limit. 4.

avowal had been fully acquiesced in by the beneficiaries, the appellants in this cause, and that such disavowal was made so long before the commencement of the action that the bar of the statute was fully formed at that time. The court concludes that, even if the claim would not have been barred, had there been no disavowal, it was certainly barred by the disavowal of the trust and the lapse of time thereafter.[3]

[3] Raymond v. Simonson, 4 Blackf. 77; Perry on Trusts (3d ed.), § 864; Wood on Limit. 433.

COLLATERAL ATTACK.

Can a judgment be attacked collaterally by the defendant therein, or by any person claiming by, through or under him, where the title to property has been affected by such judgment?

The general understanding has been that a judgment rendered by a court of general jurisdiction, which, in the particular case, was exercising its jurisdiction according to the course of the common law, and not pursuant to a special power conferred upon it by statute, was not the subject of collateral attack, but that the jurisdiction of the court would be presumed unless there was something in the record itself which showed that the court did not have jurisdiction either of the subject-matter of the action, or of the person of the defendant; or, in other words, if it appeared by any recital in the judgment that the process had been duly served, and the return of the sheriff, on its face, showed an apparently good service of the summons, the judgment could not be impeached by extrinsic evidence showing that the writ had not in fact been served; it could only be attacked collaterally by intrinsic evidence, by evidence to be found in the record.

In Smith's Leading Cases,[1] it is said: "Superior courts are presumed to act by right, and not by wrong, and their acts and judgments are consequently conclusive in themselves, unless plainly beyond the jurisdiction of the tribunals, whence they emanate." [2]

[1] Vol. 1, part 2, page 991.

[2] Peacock v. Bill, 1 Saund. 73; Grignon's Lessee v. Aston, 2 How. 319; Briggs v. Clark, 7 How. (Miss.) 457; Cook v. Darling, 18 Pick. 393; Venable v. McDonald, 4 Dana, 336; Huntington v. Charlotte, 15 Vt. 46; Wells v. Mason, 4 Scam. 84, Wright v. Watson, 11 Hunph. 529; Morgan v. Burnet, 18 Ohio, 535; Pennington v. Gibson, 16 How. 62; Hall v. Law, 2 W. & S. 135; Ladd v. Higley, 5 Oreg. 256.

And again on page 995, it is said: "Few rules are supported by a greater weight of authority and reason, or have been longer or more generally regarded as established law, than that which holds that the proceedings of superior tribunals must be presumed to be correct, unless manifestly erroneous, and cannot be contradicted or convicted of error by extrinsic evidence." [3]

If a judgment can be attacked collaterally and the attack sustained solely by extrinsic evidence, there will be relegated to "the dead and obsolete past" a principle of law which has heretofore been considered sacred and as essential to the safety and stability of property rights, as the writ of *habeas corpus* to personal liberty. Such a result would unsettle and render uncertain the title of the greater portion of the real property throughout the whole country and cause a serious depreciation in the value thereof. The title to a very considerable portion of the landed property in the United States is dependent upon conveyances made by sheriffs where the property has been sold under execution, by executors or administrators when sales have been made under the orders of probate courts, or by masters in chancery pursuant to decrees of courts of equity; and if, after the lapse of years, such title is liable to be overturned by collateral attack upon the judgment, order or decree on which it is based, and such attack can be founded on extrinsic evidence, then, indeed, no man, whose title rests upon the deed of a sheriff, executor, administrator, or a master in chancery, can have any assurance that his title is good; but, on the other hand, he is liable at any moment to be vested from the possession of his property, for which he paid in full and which he had purchased in good

[3] Pease v. Whitten, 31 Me. 117; Cochran v. Loring, 17 Ohio, 409; Newman v. Cincinnati, 18 Ohio, 323; Parks v. Moore, 13 Vt. 183; Grier v. McLandon, 7 Ga. 362; Selin v. Snyder, 7 S. R. 171; Barron v. Tart, 18 Ala. 668; Hahn v. Kelly, 34 Cal. 391; McCauley v. Fulton, 44 Cal. 355; McDonald v. Leewright, 31 Mo. 29; Exchange Bank v. Ault, 102 Ind. 322; s. c., 1 N. E. Rep. 562; Cassady v. Miller, 106 Ind. 69; s. c., 5 N. E. Rep. 713; Hughes v. Cummings, 7 Colo. 138, 293; s. c., 2 Pac. Rep. 289, 928.

faith as a home for himself and family, and to be "thrown upon the charity of a cold and heedless world," by some interloper who finds a flaw in the judgment under which he holds, or some defect in the service of the process on which that judgment is based, and that, too, when the defect is not apparent upon the face of the return, but dependent wholly upon matter *dehors* the record. It may be presented and made known for the first time upon the trial of the action, and when the person, whose rights are attacked, will have no opportunity to produce evidence showing that the return is true in fact, evidence which he might be able to obtain if he only had a little time to search it out. The pleadings in the action need not point out the defect; it is not necessary, nor is it proper, to plead the evidence upon which one proposes to rely. Therefore, the party, whose title is assailed, will have no notice whatever of the particular defect upon which his adversary proposes to rely; and he cannot be prepared to meet a defect which is first pointed out to him by the evidence adduced upon the trial. If the evidence, by which the plaintiff expected to be able to sustain his cause of action, were pleaded, the defendant would then have time for preparation and might be able to meet his adversary with evidence of equal or greater weight. Take the following as an illustration: A purchases at sheriff's sale, upon execution, a piece of land which had been levied upon as, and which was at the time, the property of B. The return of the sheriff upon the summons in the action against B is as follows: "Executed on the first day of January, 1870, by leaving a certified copy thereof at the usual place of residence of the within named defendant, B," and signed by the sheriff. This mode of service is good under the laws of the State and the return of the officer is in proper form. After the rendition of the judgment and the levy of the execution on the land, B sells and conveys said land to C, but the purchaser at the execution sale obtains his deed and takes possession of the land. After the lapse of eight or nine years A sells and conveys to D, and moves off of the land. Before D takes possession under his deed, C enters and refuses to surrender upon demand. D then commences an action ejectment to recover the land. In his complaint he alleges that he is the owner in fee simple of the tract of land therein described, and entitled to the possession thereof, and that the defendant, C, wrongfully withholds the same from him to his damage, etc.

The defendant, C, in his answer, denies specifically each and every allegation of the complaint, and then alleges that he (C) is the owner of said real property and entitled to the possession thereof.

The issues are made up and the action is tried, in all probability, at the same term of court at which the pleadings are completed. After the plaintiff has introduced all of his evidence, record evidence which shows to the satisfaction of the jury that the plaintiff is entitled to recover, the defendant is allowed by the court to introduce one or two witnesses, who testify that on the first day of January, 1870, the said B was a non-resident of the State; that he moved out of the State in the spring of 1869 and had not since that time had a "place of residence" therein. This evidence, of course, shows that the original judgment against B was void for want of jurisdiction of the person of B, and thus D loses his home, although C purchased with full knowledge of the fact that judgment had been entered against B, and that the land of B had been levied on to satisfy said judgment.

Such evidence is objectionable, because the defendant is thereby permitted to make a collateral attack upon a judgment by extrinsic evidence.

Freeman, in his work on Judgments, second edition, § 124, says: "Nothing shall be intended to be out of the jurisdiction of a superior court, but that which expressly appears to be so.[4] Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack, that the court, if of general jurisdiction, has acted correctly, and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. The decisions to this effect are very numerous." And he cites as sustaining this proposition, many other cases.[5]

[4] Gassett v. Howard, 10 Q. B. 453.

[5] Withers v. Patterson, 27 Tex. 491; Holmes v. Campbell, 12 Minn. 221; Reynolds v. Stansberry, 20

It is objectionable for the further reason, that it permits the return of the officer to be contradicted by parol testimony. The return of an officer on original process is not liable to impeachment, except upon a direct proceeding against such officer for a false return.[6]

The case of Lessee of Fowler v. Whiteman,[7] seems to be in point.

In 1835, one Longworth filed in the court of common pleas of Hamilton county, against John Trimble and others, heirs-at-law of Timothy Trimble, deceased, a bill in chancery to settle and quiet the title to certain land in said bill set out. At the time of the filing of the bill, and during the whole pendency of the suit, the heirs of Timothy Trimble were non-residents of Ohio.

By a statute then in force, notice to non-resident defendants was to be given in such mode as the court should direct; accordingly, the court had, at the June term, 1835, made the following order: "It being shown to the court that the defendants in this cause are not residents of the State of Ohio, court order that notice of the pendency, objects, and prayer of the bill be given to the said defendants by publication, weekly, for six successive weeks, in some newspaper published, and of general circulation, in the county of Hamilton, and that a copy of such paper containing said notice be directed to the place of residence of said defendants, if known."

At the October term, 1835, the following entry was made on the journal: "Due proof of the publication of the pendency of this cause being now filed, thereupon rule for answer in sixty days, and cause continued."

At the same time a copy of the notice, with proof of its publication, was filed, and also the following affidavit: "Adam N. Riddle, being duly sworn, deposeth and saith that the *Cincinnati Gazette*, the newspaper in which the above notice was inserted, was by said deponent transmitted by mail to Nathaniel P. Hill and others, defendants in said cause, to Montgomery, Orange county, New York, on the 11th day of July, A. D. 1835. Further deponent saith not."

It appears in the decree that the court found "that due notice had been given to the defendants by publication in due form of law," and on the hearing quieted the title in said Longworth.

In the case of Lessee of Fowler v. Whiteman,[8] this decree was attacked collaterally, and on the trial the plaintiff, the party making the attack, offered testimony tending to prove that, at the time the order of the June term, 1835, was made, and when notice was published in the *Gazette*, some of the defendants to the bill resided in New York, others in Pennsylvania, and others in New Jersey, and that their respective places of residence were known to Adam N. Riddle, who was Longworth's solicitor, but that he had sent copies of the notice to only part of them, and that among those to whom he had not sent were the lessors of the plaintiff.

The court held that the decree could not be collaterally impeached, but that, while such finding was unreversed, it was conclusive of the matter found.

And yet, in the case of Trimble v. Longworth,[9] upon a direct attack by bill of review, this decree was set aside for the reason that the court had not acquired jurisdiction of the defendants.

Such evidence is certainly open to another and very serious objection, which, while it may not be sufficient to bar its admission, is nevertheless entitled to consideration, and that is, the admission of such evidence, when years have passed, since the service of the process, opens wide the door for fraud and perjury. It is also contrary to the spirit, if not the letter, of the law. The intent of the law is that the return of the officer indorsed on the process shall be *the* evidence and *the only* evidence of its truth or falsity, except, it may be, in an action against the officer for a false return.

Therefore if the sheriff's return shows that the summons has been duly served, it does not matter whether the jurisdiction of the court affirmatively appears in the judgment or not, for if it does not it will be conclusively presumed;[10] and, of course, parol evidence

Ohio, 344; Bush v. Lindsey, 25 Geo. 245; Prince v. Griffin, 16 Iowa, 552; Cox v. Thomas, 9 Gratt. 323; Ely v. Fallman, 14 Wis. 28; Arnold v. Nye, 23 Mich. 286.

[6] McDonald v. Leewright, 31 Mo. 29.

[7] 2 Ohio St. 279.

[8] *Supra.*

[9] 13 Ohio St. 432.

[10] Carpenter v. City of Oakland, 30 Cal. 447; Forbes v. Hyde, 31 Cal. 342; Colt v. Haven, 30 Conn. 198.

is not admissible to show that the summons was not in fact served on the defendant.

It would seem, therefore, that the judgment of a superior court, when exercising its jurisdiction according to the course of the common law, is not subject to collateral attack; and the question then arises: Can the judgment of a court of superior jurisdiction, when in the exercise of a special power confined by statute, be collaterally impeached? and, if so, can it be done only by the record and when the judgment does not contain any finding on the question of jurisdiction, or can the jurisdiction be attacked by extrinsic evidence?

The case of McCauley v. Fulton,[11] was one in which a collateral attack was made upon a judgment rendered in a preceeding where the summons was served by publication. The recital in the judgment attacked was: "The defendant having been regularly served with process by publication of the summons issued herein, and having failed to appear and answer the complaint of the plaintiff on file herein, and the legal delay for answering having expired, and the default of the said defendant in the premises having been duly entered according to law," judgment is ordered to be entered in accordance with the prayer of the complaint. It was claimed that the affidavit and order showing service by publication were defective and insufficient, but the court said: "The judgment does not appear to be void on the face of the record. It purports to have been entered in pursuance of an order, and the presumption is it was entered in pursuance of an order of the court. All intendments are in favor of the judgment. In order to attack it collaterally, its invalidity must appear on the face of the record." [12]

The error in the California cases, if error it be, would seem to be in holding that the affidavit and order for the publication of the summons formed no part of the record or judgment roll in the cause.

The judgment roll consists of the following papers:

I. If the complaint has not been answered by any defendant, the complaint, summons, and proof of service, and a copy of the entry of judgment.

II. In all other cases, the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment.

It would seem, under these provisions, that the affidavit and order for the publication of summons should be considered as part and parcel of the summons itself. The affidavit and the facts stated therein are the only things which give the court jurisdiction to order the summons to be served by publication. The statute specifies and particularizes the facts which the affidavit must contain. If these statutory requirments are not complied with in the affidavit, the court does not acquire jurisdiction to make the order for the publication of the summons. The order of the court and the affidavit jointly, each fully meeting in all respects the requirements of the statute, are necessary to authorize the publication of the summons; they are the basis of jurisdiction and they should, therefore, be considered as part of the summons and as a necessary part of the judgment roll.

In the case of Odell v. Campbell,[13] the judgment of a superior court was attacked collaterally. The judgment sought to be impeached, one rendered in the case of Coovert v. Odell, was a judgment rendered in an action, where the summons had been served by publication.

In referring to the affidavit and order for publication, the court does not say whether or not they constituted part of the judgment, but, if they did not, they could not be considered.

Referring to the affidavit Lord, C. J. says: "Tested by Forbes v. Hyde, 31 Cal. 250, which was cited and approved by Mr. Justice Deady, in Neff v. Pennoyer, 3 Sawyer, 289, with great force and reasoning, the affidavit is fatally defective in more than one particular. But inasmuch as the Supreme Court of the United States, in the last named case, 5 Otto, 721, held that defects in the affidavit could only be taken advantage of an appeal, or some other direct proceeding, and could not be urged to impeach the judgment collaterally, and as the defects in the affidavit

[11] 44 Cal. 355.

[12] Hahn v. Kelly, 34 Cal. 391. And see several other California decisions.

[13] 9 Oreg. 298.

will not change the conclusion we have reached, the further consideration of the affidavit is dismissed without expressing any opinion on that point."

Speaking for the court and in reference to the order for the publication of the summons, he says: "Such an order—reciting the facts which did appear to the satisfaction of the judge—discloses affirmatively the authority of the court to exercise its extraordinary jurisdiction. But when the order of the court omits to direct a deposit in the post-office, and there is nothing in the record, or in the facts recited in the order, to excuse such omission, the requirements of the statute are not complied with by mere publication. The statute contemplates, if possible, that actual notice shall be had of the pendency of the action. Deposit in the post- office, directed to the residence of the defendant, would be much more likely to notify him of the pendency of the action, than publication of the summons in a newspaper, however general its circulation." * * "The order is an essential part of the proceedings of this character, and necessary to show jurisdictional facts, without which the judgment will be a meeting. The importance, then, and the necessity of the order bearing upon its face the necessary statutory requirements, becomes evident. It must not only direct the publication in a paper designated, and for the period prescried, but it must do more. The statute requires that it must direct a copy of the summons and complaint to to be forewith deposited in the post-office, directed to the defendant at his place of residence, or the facts excusing the omission to make such direction of deposit must appear, or the order allowing service by publication, and the service and judgment following it, will be void."

The return of the sheriff that the summons has been executed and setting forth the manner of services determines the question of jurisdiction, and the recital in the judgment that process had been duly served in the manner prescribed by law, or the total silence of the judgment in this respect, neither adds to nor detracts from the validity of the judgment. The affidavit is that which gives the court jurisdiction to make the order of publication. Why, then, if the affidavit contains all the requirements of the statute, sets out every fact and circumstance necessary to authorize the making of the order, should the failure to recite these facts in the order affect the validity of the order, the publication of the summons and of the judgment rendered? I am, therefore, of the opinion that both the affidavit and the order are necessary parts of the judgment roll and entitled to be considered in determining the question of jurisdiction. In Neff v. Pennoyer,[14] Judge Deady say: "In considering, then, the objections made to the judgment in Mitchell v. Neff, the court will inspect the affidavit and order for publication, as well as the rest of the record, upon the double ground that they are properly a part of the judgment roll, and also a part of the general record of the case, and therefore, in either case, of equal variety with any part of such roll."

Lessee of Fowler v. Whiteman,[15] appears to hold, and Hahn v. Kelly,[16] and McCaulley v. Fulton,[17] do hold a contrary doctrine, but the case of Hahn v. Kelley was overruled in Belcher v. Chambers,[18] and the case of Northcut v. Lemery,[19] holds that, where from the length of time intervening between the filing of the complaint and the date of the decree, it is apparent that the summons could not have been published the number of times required by law, such decree can be impeached collaterally, notwithstanding the decree recited that "the defendant had been served by publication as required by law."[20] It would seem, therefore, that the judgment can be impeached collaterally by intrinsic evidence. Can it be done by matter *dehors* the record?

In the case of Mastin v. Gray,[21] the Supreme Court of Kansas, Brewer, J., dissenting, held that the trial court committed no error, where, in an action to recover possession of real property, after the plaintiff had shown that his title was founded upon a sheriff's deed made in pursuance of a sheriff's sale on an execution issued by the clerk of the district court on a transcript of a judgment of a justice of the peace filed in

[14] 3 Sawyer, 288.
[15] 2 Ohio St. 271.
[16] *Supra.*
[17] 44 Cal. 355.
[18] 53 Cal. 635.
[19] 8 Oreg. 316.
[20] See also Smith's Leading Cases, vol. 1, part 2, page 1011, of 6 Am. ed. and cases there cited.
[21] 19 Kan. 458.

said clerk's office, which judgment was rendered on default against J. H. H., the then owner of the land in controversy, on a constable's return of service of summons, which return stated that said writ was "executed on the 15th of December, 1860, by leaving a certified copy at the usual place of residence of the within named defendant, Jane Hicks Brown. H. H. Sawyer, constable;" the district court permitted the defendant to impeach said deed, judgment, and constable's return by showing that the said return was false, that the said J. H. Brown was not at the time a resident of Kansas, that she had no residence in Kansas, and was not herself in Kansas, but at that time, and for a long time before and afterward, she resided and was herself personally in the Indian Territory.

This was a case where the judgment attacked was the judgment of an inferior court and the mode of service of process was statutory; but the court in deciding the case laid no stress upon these facts, and held, in substance, that a domestic judgment could be collaterally impeached by extrinsic evidence. The language used by the court is applicable to judgments of superior, as well as inferior courts. The court say: "But the difficult question to determine arises when it is attempted to impeach a domestic judgment collaterally and by extrinsic evidence. There are authorities which hold that it cannot be done." And here the court cite several authorities. "While there are other authorities which hold that it may done."

I have examined such of the authorities relied upon by the Kansas court as sustaining or tending to sustain their holding, as I could obtain, and among them the following, as hereinafter shown. The cases of Pollard v. Baldwin,[22] and Price v. Ward,[23] arose on foreign judgments and the decisions were applicable to such judgments only.

The case of Cooper v. Sunderland,[24] holds: "When the jurisdiction of an inferior court has actually attached, it will not be lost by an irregularity in the mode of exercising it; and when the jurisdiction is once shown or admitted, the judgments of superior and inferior courts stand on the same footing, and are equally and absolutely conclusive, when attacked collaterally."

In Miller v. Handy,[25] the court say: "If a court has not got jurisdiction of the person by service of process on him, then all of its proceedings are *coram non judice* and void, and may be attacked in a collateral action," but held that where, "the judgment in a case of *scire facias* to foreclose a mortgage set forth that, 'it appearing to the court that two writs of *scire facias* have been issued herein, and *nihil* returned thereon,' etc., this finding of the court is strong presumptive evidence of those facts, and can be rebutted only by the *clearest proof appearing in the record itself.*"

The case of Pollard v. Wegener,[26] holds: "Where the facts upon which the court assumed jurisdiction are *recited in the record*, and appear by it to have been such as in law did *not* confer such jurisdiction, the defendant is not bound by the judgment."

Rape v. Heaton,[27] was an action on the judgment of another State, and the court held: "Where a summons directed to two defendants is returned by the sheriff, as served by leaving a certified copy with the family of one of the defendants, without showing which, such service is void for uncertainty, as to both defendants."

The case of Carleton v. Bickford,[28] simply holds: "In an action in this State on a judgment of a court of another of the United States, a return of the officer in that action, that he made personal service on the defendant in that State, may be contradicted by parol evidence." This holding is based upon the theory that the judgments of the courts of other States are not entitled to the same full faith and credit as domestic judgments, and this theory is drawn for the case of D'Arcy v. Ketchum,[29] consequently this case cannot be considered as authority tending to sustain the decision of the Kansas court.

It would seem, therefore, that these cases, all of which were cited in the case of Hastin v. Gray,[30] do not sustain the opinion of the court in that case, but that, on the contrary,

[22] 22 Iowa, 328.
[23] 25 N. J. L. 225.
[24] 3 Iowa, 114, 127.
[25] 40 Ill. 448.
[26] 13 Wis. 569.
[27] 9 Wis. 328.
[28] 13 Gray, 591.
[29] 9 How. 390.
[30] *Supra.*

some of them are directly in conflict therewith.

The Supreme Court of Illinois, in the case of Bottsford v. O'Conner,[31] say: "When the court, by the decree, finds there was service, that, like any other finding of the court, can never be contradicted in a collateral proceeding, by parol or other evidence, outside of the record in that proceeding. It, however, may be by other portions of the same record. But such finding is conclusive in a collateral proceeding, unless thus rebutted."

Again, in the same case: "Where service is by summons, parol evidence will not be heard to prove or aid it." Why, then, should parol evidence be admissible to show that the return on the summons is incorrect?

The latest expression of opinion by the Supreme Court of the United States that has come to my knowledge is to be found in the case of Herron v. Dater, opinion filed March 7, 1887, and reported in 7 Supreme Court Reporter, 620, the point to which I refer being found on page 627. "The next assignment of error is founded upon the objection to the admission of the record and proceedings in the orphans' court of Philadelphia county, resulting in the sale of the title of Nicholas Le Favre to the Lewis Walker tract to Joseph Brobst, by the deed of May 9, 1837. This objection was that it appeared from the face of the petition for the sale of the real estate of the decedent that the debts, to pay which it was alleged that the sale was necessary, were barred by the statute of limitations, and that, as a consequence, the orphans' court had no jurisdiction to make the order of sale. The course of proceeding taken in the present case, as shown by the transcript, was, (1) a petition to the orphans' court of Philadelphia for authority to sell, that being the court which had jurisdiction of the accounts of the executor; (2) a petition to the orphans' court of Northumberland county, in which the land was situated, an order of sale granted thereon, and sale made, and, as required by the express provisions of the statute of 1832, then in force, the return of the sale made to and confirmed by the same court sitting in the county where the land is situated. It is scarcely necessary to cite authority in support of the proposition that the orders, judgments, and decrees of the orphans' court, in a case where it had jurisdiction of the subject-matter, cannot be impeached collaterally."

And in Dresher v. Allentown Water Co.,[32] Mr. Justice Strong said: "Orphans' court decrees are doubtless conclusive. They cannot be impeached collaterally."

I am, therefore, of the opinion that, if a judgment can be attacked collaterally, it can only be impeached by matter appearing upon the face of the record.

D. R. N. BLACKBURN.

[31] 57 Ill. 72.

[32] 52 Pa. St., 229.

QUO WARRANTO—TERM OF OFFICE—REPEAL OF STATUTE — CONSTITUTIONAL AMENDMENT—ESTOPPEL.

GRIEBLE V. STATE EX REL. NEIZER.

Supreme Court of Indiana, June 30, 1887.

1. *Quo Warranto—Office—Remedy to Obtain Possession.*—An information in the nature of a *quo warranto* will lie to obtain possession of an office to which one has been legally elected and for which he has duly qualified, and to remove the incumbent who has usurped and illegally holds it.

2. *Office—Term of County Auditor—Repeal of Statute by Constitutional Amendment.*—Where the term of an officer is fixed by the constitution, the legislature can neither extend nor abridge it; but an act not in conflict with the constitution may be repealed by amendment of the constitution; and the Indiana act of March 3, 1885, fixing the beginning of terms of county auditors on the first Monday of November, "immediately following the general October elections," was thus repealed by implication by the constitutional amendment of March 4, 1881, changing the time of general elections to November.

3. *Same—Expiration of Term—Estoppel.*—Whenever a county auditor has served his full term of four years, and his successor has been duly elected and qualified, he is estopped from denying that his term of office has expired.

NIBLACK, J., delivered the opinion of the court:

This proceeding is based upon an information in the nature of a *quo warranto* against Adolph Louis Grieble in the name of the State, and on the relation of John B. Niezer. The information gives the court to understand and to be informed that, on the seventh day of November, 1882, at a general election held on that day in the county of Allen, in this State, the said Grieble was duly elected auditor of said county of Allen, and that, after having duly qualified, he, on the 17th day of that month, entered upon the duties of the office to which he had been so elected; that, under the

constitution and laws of this State, the said Grieble was entitled to hold said office for and during the period of four years from the 13th day of said month of November, 1882, and until his successor should be elected and qualified; that at the general election held in said county of Allen on the second day of November, 1886, the relator, Niezer, was lawfully elected auditor of that county as the successor of the said Grieble; that the said relator was at the time of his said election, and still is, eligible to the office of auditor to which he was so elected; that on the sixth day of the said month of November, 1886, a commission was duly issued to the relator by the governor in pursuance of his said election, and that on the 13th day of said month he, the relator, executed an official bond as such auditor, and took the oath of office required by law; that on the 17th day of said month of November, 1886, the relator demanded of the said Grieble that he should surrender said office of auditor, and all the books, papers, and property pertaining to the same, to him, the relator, but that the said Grieble wholly failed and refused, and still fails and refuses, to comply with said demand, and has ever since usurped, and illegally continued to hold, said office, and still continues to hold the same, and to perform the duties pertaining thereto, in violation of the rights and to the prejudice of the relator. Wherefore the relator prays that the said Grieble be ousted from said office, and that he, the relator, may be declared entitled to the possession thereof, and that he may have all other and proper relief.

A demurrer to the information being first overruled, Grieble answered, admitting that he was elected auditor of Allen county on the seventh day of November, 1882, as alleged in the information, but averring that at that time one Martin E. Argo was the incumbent of said office, and that on the 17th day of that month the said Argo requested him, the said Grieble, to take immediate possession, and to enter upon the duties of the office; that he, the said Grieble, thereupon informed the said Argo that his term of office would not commence until either the first day of March, or the first day of November, of the year 1883; that the said Argo nevertheless desired that he, the said Grieble, should immediately take possession of the office, which he consented to do, and did at once, continuing ever since in the possession of the same, and in the discharge of the duties thereof, under a claim that his term of office will not expire until the first day of November, 1887, at which time he will be ready to surrender the office to which the relator has been elected, as stated in the information; that the relator's term of office does not begin until said first day of November, 1887.

The relator replied that Argo was elected auditor of said county of Allen at a general election held on the second Tuesday in October, 1878, for the term of four years, commencing on the seventh day of November, 1878; that, after having given bond and qualified as the law required, he, on the said seventh day of November, 1878, took possession of the office, and entered upon the discharge of his duties as such auditor, and so continued for the full term of four years thereafter; that after the expiration of his term of office, to-wit, on the 17th day of November, 1882, he surrendered the office to the respondent, Grieble, who had been, on the seventh day of that month, properly elected to the office as the successor of him, the said Argo, and who had previously given bond and qualified as the auditor elect of said county of Allen; that he, the said Argo, so surrendered the office because his term of office had expired, and because the said Grieble was lawfully entitled to the possession of the office as his successor therein, and for no other reasons; that the said Grieble, as such successor, has held said office ever since the 17th day of November, 1882, and for the full term of four years. Grieble demurred to this reply; but, his demurrer being overruled, he elected to stand upon the demurrer, and declined to make further defense. The court thereupon entered judgment in favor of the relator, and ordered Grieble to deliver to him the possession of the office, together with all the books, papers, and property pertaining thereto. Error was assigned upon the overruling of the demurrers to the information and the reply, respectively.

An information in the nature of a *quo warranto* is the appropriate remedy for obtaining the possession of an office to which a person has been legally elected, and has become duly qualified to hold. It is also the proper remedy for the removal of the incumbent of an office who has usurped and illegally continues to hold it, and both remedies may be sought by the same information. Rev. St. 1881, §§ 1131-1134; 5 Wait, Act. & Def. 259, 263; People v. Forquer, Breese, 104; St. Louis Co. v. Sparks, 10 Mo. 117; *In re* Strong, 20 Pick. 484; Sudbury v. Stearns, 21 Pick. 148; Lindsey v. Attorney-General, 33 Miss. 508; People v. Kip, 4 Cow. 382, and note; Gass v. State, 34 Ind. 425. There is consequently no serious objection to the substantial sufficiency of the information.

The reply raises the question as to when the term of a county auditor either begins, or may begin, under the present constitution of this State, and certain statutes having reference to that subject. Before the adoption of our present constitution, the office of county auditor was only a statutory office. Section 44, of the second article of chapter 7, of the Revised Statutes of 1843, provided that the "county auditor shall hold his office for the term of five years from the first Monday in March next succeeding his election, and until his successor is chosen and qualified." Rev. Stat. 1843, p. 188. Section 49, of the same article, further provided that, when a vacancy should happen in the office of county auditor, the board of commissioners of the proper county should appoint some suitable person to fill the vacancy, who was to hold the office until the next general election, and until his successor was elected and

qualified. Under these two sections the term of a county auditor who succeeded a full term, and a regular succession of terms, commenced on the first Monday in March next after his election; but, where a person was elected to succeed one who held the office by appointment to fill a vacancy, his term commenced as soon as he was commissioned and qualified, and was ready to enter upon the duties of the office. This was usually within a few weeks after the election, which was then held annually in August, but was not in the nature of things uniform as to time. After a lapse of a few years, therefore, the term of the office of county auditor in many of the counties of this State was, by reason of intervening vacancies, made to begin some time soon after the August election, at which the office was filled, instead of on the first Monday in March next succeeding, and this condition of things existed when our present State constitution was adopted, which first gave that office a constitutional term as well as a constitutional *status*. The second section of article 6, of the constitution, ordains that there shall be elected in each county, by the voters thereof, at the time of holding general elections, a clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and surveyor. The clerk, auditor, and recorder shall continue in office four years, and no person shall be eligible to the office of clerk, recorder, or auditor more than eight years in any period of twelve years; the rest of the section having reference only to the terms of treasurer, sheriff, coroner, and surveyor. The third section of article 15, of the constitution, further ordains that, "whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given time, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified." The tenth clause of the schedule annexed to the constitution for the purpose of facilitating the reorganization of the State government under that instrument, provided that "every person elected by popular vote, and now in any office which is continued by this constitution, and every person who shall be so elected to any office before the taking effect of this constitution (except as in this constitution otherwise provided), shall continue in office until the term for which such person has been or may be elected, shall expire: provided, that no such person shall continue in office, after the taking effect of the constitution, for a longer period than the term of such office in this constitution prescribed."

Under the operation of these constitutional provisions, there has never been, since they took effect, any uniformity either as to the time when the term of county auditor begins, or as to when it expires, in the several counties of this State; and this want of uniformity has been greatly increased by the respective changes of the times of holding our general elections which have ensued. The act of May 31, 1852 (Rev. Stat. 1881, § 5893), nevertheless declared that a county auditor's term of office should thereafter begin on the first Monday in March next succeeding his election, and the act of March 3, 1855 (Acts 1855, p. 52), prescribed, among other things, that the terms of county auditors "shall commence on the first Monday of the month of November immediately following the general October elections," and fixed that day as the time at which the terms of persons thereafter elected to the office of county auditor should expire. In the case of Howard v. State, 10 Ind. 99, it was held that the legislature has no power either to abridge or to extend the term of an officer, where his term is prescribed by the constitution, and that hence the act of 1855 was in conflict with the second section of article 6 of the constitution hereinabove set out, and for that reason void. In the more recent case of Douglass v. State, 31 Ind. 429, the doctrine that the legislature can neither abridge nor extend the term of an officer which is fixed by the constitution was reaffirmed, and the invalidity of the act of 1855, as applicable to cases like that of Howard v. State, was again recognized, but the conclusion was then also reached that the act in question might be, and probably was, operative in some cases in which the succession of terms had been broken by intervening vacancies, and that, at all events, it had validity enough to repeal, by implication, so much of the act of May 31, 1852, as declared that the terms of county auditors should commence on the first Monday in March next succeeding the times of their election. To the conclusion at which this court then arrived, and as thus stated, we still adhere.

We have also reached the further conclusion that the act of 1855 was in effect abrogated and annulled by the amendment of the constitution which changed the time of holding our general elections from October to November. The adoption of a new constitution repeals and supersedes all the provisions of the old constitution not continued in force by the new instrument. The same rule applies to amendments of an existing constitution which are inconsistent with the original text of the instrument amended; also to statutory enactments which are inconsistent with later constitutional provisions embracing the same subject-matter. Pierce v. Delamater, 1 Comst. 17; Potter's Dwar. St. 113; Sedg. Const. & St. Law, 107. This act of 1855 had special reference only to the terms pertaining to certain offices which had then to be filled at an October election; and when the October election was abolished, there was no longer any election to which the act was, in any proper sense, applicable. The case presented, therefore, is one of the implied repeals of a statute by the adoption of an inconsistent constitutional amendment. There is consequently no statute now in force prescribing when the term of a county auditor shall be held to begin. On that subject we are remitted to the

provisions of the constitution and of the schedule annexed, to which we have already referred. Where there has been an unbroken succession of terms from the adoption of the constitution until the present time, and no general acquiescence in a different day or time, the commencement of a county auditor's term dates back to, and is governed by, the time at which the term of the auditor who was in office when the constitution took effect, expired. But where the regular succession of terms has been broken either by intervening vacancies, or other incidental causes, the term of a newly-elected auditor begins when the regular four-years' term, or the provisional term, as the case may be, of his predecessor, expires; and this results independently of any statute which may have been, or may hereafter be, enacted on the subject. Whenever a county auditor has, in pursuance of an election to the office, served the full term of four years, and his successor has been duly elected and qualified, he is estopped from denying that his term of office has expired. As has been shown, it is only when his successor has not been chosen and qualified that a county auditor is authorized to continue in office beyond his term of four years. See 1 Op. Atty. Gen. Hord, 113; State v. Thoman, 10 Kan. 191; Fant v. Gibbs, 54 Miss. 396; People v. Bull, 46 N. Y. 57; State v. Howe, 25 Ohio St. 588; State v. Brewster, 9 N. E. Rep. 849; State v. Chapin, 110 Ind. 272, 11 N. E. Rep. 317.

There is nothing averred in this case from which it can be inferred what the succession of terms in the office of auditor of Allen county has been, but the reply alleges that Argo, soon after his election in 1878, took possession of the office, and held it for the full term of four years; that after his term had expired—that is to say, on the 17th day of November, 1882—Grieble, as his duly elected and qualified successor, came into possession of the office, and served as such successor for the ensuing term of four years. The reasonable, and hence proper, inference from these allegations is that Grieble was lawfully entitled to enter upon the duties of the office when he took possession of it, and that he had served out his full constitutional term of four years when Niezer demanded the office of him as stated. The facts, as alleged in the reply, when taken in connection with those set forth in the information and the answer, are sufficient to show that, as against Niezer, Grieble's term had expired when the demand was made. Consequently the demurrer to the reply was rightly overruled.

The judgment is affirmed, with costs.

NOTE.—The writ of *quo warranto* was originally "a high prerogative writ in the nature of a writ of right for the king against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim." This was, however, gradually supplanted by the information in the nature of a *quo warranto*, which was greatly enlarged in scope by the statute of 9 Anne, ch. 20, 1711, preserved or re-enacted in substance in most of our States. The use of this information has so far taken the place of the older writ and become exclusive that some of the courts speak of it by the term "*quo warranto*," and the two terms have been held to be synonymous.[1] But in others the distinction is still preserved.[2]

An information in the nature of a *quo warranto* is now, therefore, as held in the principal case, the appropriate remedy in most, if not all, jurisdictions, to oust a party who has usurped and illegally holds a public office.[3] There is some conflict in the authorities as to whether the possession of the office may be sought and obtained by the person who has been duly elected and qualified, by the same information.[4] The following offices have been held to be of such a character as to justify proceeding by information in the nature of a *quo watranto*, in proper cases, for usurpation thereof, namely: That of city mayor[5] or president of a city council,[6] city marshal,[7] county clerk,[8] county treasurer,[9] county sheriff,[10] county commissioner,[11] member of board of assessment of taxes,[12] tax collector,[13] school director,[14] judge of probate court,[15] justice of the peace,[16] governor,[17] lieutenant-governor[18] and others.[19] It has also been upheld in case of certain militia officers.[20] In some cases it has been held that an information will lie against a member of a city council;[21] but in others the contrary is held.[22] The information will not lie unless there has been a user of the office.[23]

The title to the office may also generally be tried in such proceeding.[24] *Quo warranto*, and not injunction

1 State v. Gleason, 12 Fla. 190; State v. West. Wis. R. Co., 34 Wis. 197.

2 State v. St. L. Ins. Co., 8 Mo. 330; State v. Ashley, 1 Ark. 279, 513. See, generally, note to People v. Rensselaer, etc. R. Co., 30 Am. Dec. 33, 45; 2 Dill. Munic. Corp. § 888.

3 State v. Anderson (Ohio), 12 N. E. Rep. 656; Tarlox v. Sughrue (Kan.), 12 Pac. Rep. 935; Territory v. Ashenfelter (N. Mex.), 12 Pac. Rep. 879; s. c. (abstract), 24 Cent. L. J. 284; High Ex. Leg. Rem. § 623, *et seq.*; *In re* Harris, 6 Ad. & E. 475; Broom's Com. *256*g*.

4 That it may, see Bonner v. State, 7 Ga. 473; Ellison v. Aldermen, 89 N. C. 125; People v. Ryder, 12 N. Y. 433. And compare authorities cited in support of this in principal case. *Contra:* Lewis v. Whitler, 77 Va. 415; Strong, Petitioner, 20 Pick. 484; Howard v. Marshall, 9 Md. 83. These cases hold *mandamus* the proper remedy.

5 Gass v. State, 34 Ind. 425; People v. Glatcher, 55 N. Y. 525.

6 State v. Anderson (Ohio), 12 N. E. Rep. 656.

7 State v. Lufton, 64 Mo. 415.

8 People v. Miles, 2 Mich. 348.

9 Clark v. People, 15 Ill. 217.

10 Com. v. Walter, 83 Pa. St. 105; s. c., 24 Am. Rep. 154.

11 State v. Bemenderfer, 96 Ind. 374.

12 State v. Hammer, 42 N. J. L. 435.

13 Hyde v. State, 52 Miss. 665.

14 State v. Boal, 46 Mo. 528.

15 People v. Heaton, 77 N. C. 18.

16 Vogel v. State, 107 Ind. 374.

17 Atty.-Gen. v. Barstow, 4 Wis. 567.

18 State v. Gleason, 12 Fla. 265.

19 See note to People v. Rensselaer, etc. R. Co., 30 Am. Dec. 47, and English authorities there cited.

20 See State v. Brown, 5 R. I. 1; Com. v. Small, 26 Pa. St. 31; Duane v. McDonald, 41 Conn. 517.

21 Com. v. Allen, 70 Pa. St. 465; People v. Hall, 80 N. Y. 117; Com. v. Muser, 44 Pa. St. 341.

22 People v. Metzker, 47 Cal. 524; State v. Tomlinson, 20 Kan. 692.

23 People v. Callaghan, 83 Ill. 128; Rex v. Prusonby, 1 Vesey, 1; 2 Dill. Munic. Corp. (3d ed), § 903; State v. Chosen Freeholders (N. J.), 1 Atl. Rep. 515.

24 State v. Shay, 101 Ind. 36, and authorities cited; People v. Richardson, 4 Cow. 100, and note 101.

or *mandamus*, is, as a rule, the proper remedy to try the question of title to office.[25] But that persons acting and entitled to act as public officers have exceeded their power or assumed to act beyond their jurisdiction, is not ground for an information.[26]

The proceeding by information is usually held to be a civil action,[27] but it was originally criminal in its nature, and it is yet so held under the statutes of some of our States.[28] A trial by jury may, in most jurisdictions, now be demanded as a matter of right, and such seems to have been the rule at common law, although the question is not free from controversy.[29] Leave to file the information is not always demandable as a matter of right, but depends rather upon the sound discretion of the trial court, which must, however, be exercised in accordance with the principles of law.[30] Where the proceedings are instituted by the attorney-general, *ex officio*, without a private relator, leave of court is not necessary.[31] The defendant must either disclaim or justify.[32] If he disclaims, the people are at once entitled to judgment.[33] If he justifies, he must set forth specific facts, which, if true, would vest the legal title in him.[34] It is no answer to the information that the relator is not entitled to the office. "The defendant is called upon to show by what warrant he exercises the functions of the office; he must exhibit good authority, or the State is entitled to a judgment of ouster."[35]

W. F. ELLIOTT.

[25] Hagner v. Heyberger, 7 Watts & Serg. 104; s. c., 42 Am. Dec. 220; People v. Detroit, 18 Mich. 338; Foster v. Moore, 32 Kan. 483; Gilroy's Appeal, 100 Pa. St. 5; 2 Dill. Munic. Corp. (3d ed.) §§ 844, 892, and authorities cited in notes. See also High Ex. Leg. Rem. § 619, and authorities cited in Smith v. Myers, 9 N. E. Rep. 692, opin. 695.

[26] Stultz v. State, 65 Ind. 492; State v. Evans, 3 Ark. 585; s. c., 36 Am. Dec. 468.

[27] Robertson v. State, 109 Ind. 79; s. c., 10 N. E. Rep. 582; State v. Kupferle, 44 Mo. 154; High Ex. Leg. Rem. § 710.

[28] Donnelly v. People, 11 Ill. 552.

[29] See Reynolds v. State, 61 Ind. 393, and numerous authorities cited *pro* and *con*, showing clearly that such is the general rule in the United States at least.

[30] People v. Waite, 70 Ill. 25; People v. Railroad Co., 88 Ill. 537; Com. v. Jones, 12 Pa. St. 365; State v. Tolan, 33 N. J. L. 195.

[31] Com. v. Walter, 83 Pa. St. 105; State v. Vail, 53 Mo. 97.

[32] State v. Utter, 14 N. J. L. 84; State v. Barron, 57 N. H. 498; Swarth v. People, 109 Ill. 621.

[33] 2 Dill. Munic. Corp. (3d ed.) § 893.

[34] State v. Harris, 3 Ark. 570; Com. v. Gill, 3 Whart. (Pa.) 228; Clark v. People, 15 Ill. 213; State v. Jones, 16 Fla. 306.

[35] 2 Dill. Munic. Corp. (3d ed.) § 893. For a more detailed consideration of the pleadings and procedure upon information, see note to People v. Rensselaer, etc. R. Co., 30 Am. Dec. 33, 44, *et seq.*, and High Ex. Leg. Rem. §§ 619-761.

ESTOPPEL—INTENT—REPRESENTATIONS MADE TO PURCHASER.

LITES V. ADDISON.

Supreme Court of South Carolina, July 19, 1887.

1. A fraudulent intent is not essential to create an estoppel *in pais*.

2. In the absence of statutory enactment it is not necessary to plead an estoppel *in pais*.

3. A representation in order to create an estoppel *pais* need not be a statement of a past or existing fact; it may be a mere statement of an opinion or future intention.

4. A, having purchased a jackass of B, at B's request gave his note for a part of the money to T, a creditor of B. After the note became due, the plaintiff, with a view to purchasing it, asked A if the note was all right, and he replied, that "it was all right, and that he expected to pay it the first of January." Upon this information, the plaintiff purchased the note: *Held*, in a suit upon the note, that A was estopped from pleading a failure of a consideration.

MCIVER, J., delivered the opinion of the court:

This was an action on a note, June 24, 1885, payable one day after date, to A. A. Traylor for $275, given by the defendant; the plaintiffs claiming that the note had been duly transferred to them for value. The execution of the note was admitted, and the defense set up was failure of consideration. The defendant, having admitted the plaintiffs' case, became the actor, and undertook to establish his affirmative defense. For this purpose he offered testimony tending to show that in June, 1885, he contracted with Mrs. Lyon, through her husband and agent, for the purchase of a jackass, warranted to be sound, and suitable for the purpose for which such animals are usually wanted, at the price of $450, and gave her his note for that amount. A few days afterwards, Mrs. Lyon, being indebted to Traylor in the sum of $275, for the purchase of two horses, as was alleged, proposed to defendant to divide his note into two notes, so that she might thereby settle her indebtedness to Traylor. To this proposition defendant assented, and accordingly took up his $450 note, and gave instead thereof two notes—one to Mrs. Lyon for $175, and the other to Traylor directly, for the balance—the latter being the note upon which this action was brought. Subsequently, and after this note became due, Traylor duly transferred the note to plaintiffs, for value received of them in the purchase of a house in McCormick. Sometime in the fall of 1885, but at what particular time is not stated, the plaintiffs, with a view to the trade with Traylor, applied to the defendant to know whether he had given the note, and whether it was all right, to which defendant replied that he had given the note, that it was all right, and that he expected to pay it the first of January. Upon this information the plaintiffs traded for the note. It also appeared that when suit was commenced on the $175 note, the animal was returned to Mrs. Lyon, on account of his unsoundness, or rather his unfitness for the purpose for which he was wanted, the suit was withdrawn, and Mrs Lyon resold the animal to another party.

It may be assumed, for the purposes of this appeal, that the following facts were established: that the real consideration of the note sued on was the purchase money, in part, of the jackass, and that there was a failure of consideration, leaving as the only seriously contested question

the effect of the statements made by the defendant to the plaintiffs when they, in contemplation of the trade with Traylor, approached him upon the subject.

The circuit judge instructed the jury as to this substantially as follows: That if they believed the testimony as to what passed between the plaintiffs and defendant, in regard to the note, before it was purchased, then the defendant has thereby estopped himself from pleading a failure of consideration as against these plaintiffs. To use the language of the circuit judge, speaking of the defendant: "If he induced somebody else to pay valuable property, the maker of the note would be estopped. * * * I charge you that, if the defendant in this case, after the note became due, misled the purchaser of that note, and made no reservation at all as to any expectations of unsoundness, he cannot now set up that defense."

The jury having found for the plaintiffs the full amount of the note, the defendant appeals upon the several grounds set out in the record, as follows: (1) Because his honor refused to charge defendant's request, viz.: "That if the consideration of the note sued on was part of the purchase money of the jackass sold to defendant, and the plaintiffs received it after due, and the consideration has failed, the defense of consideration, if proved to the satisfaction of the jury, must prevail, and the verdict must be for the defendant." (2) Because his honor refused to charge the request of defendant "that the mere statement that the note was a good note, and that he expected to pay it in January, did not estop the defendant from pleading failure of consideration; that, to estop defendant, the declarations used must have been intended to deceive the plaintiffs, and that, if defendant spoke the truth in reply to a question asked, he is not estopped." (3) Because his honor charged, "as matter of law, that under the evidence the defendant was estopped from setting up failure of consideration." (4) "Because estoppel, if relied upon by plaintiffs, should have been specially pleaded, or notice of such defense given to defendant, so that he would not be taken by surprise." (5) Because the question should have been submitted to the jury whether there was any intentional misrepresentation by defendant to plaintiffs, or any inducement held out to them to take the note, which would act as an estoppel to the defense of failure of consideration. (6) Because his honor refused "to hear a motion for a new trial on the minutes, although the notice had been given, and surprise and after-discovered evidence was one of the grounds upon which the new trial was to be asked." (7) Because the judgment is in all respects contrary to the law and evidence of the case.

"The first two exceptions might be disposed of by the remark that the "case," as prepared for argument here, fails to afford any evidence that any such requests are therein set forth were ever submitted to the circuit judge. It is true that it does appear from the charge of the circuit judge, as set forth in the "case," that some request was submitted by the defendant, where he says: "I cannot charge you as requested by the defendant;" but what the request was nowhere appears, except in the grounds of appeal or exceptions; and that, as we have frequently had occasion to say, is not sufficient, for the reason that, while the "case," as submitted by the appellant, is open to amendment, as well by the counsel for respondent, as by the circuit judge, when it is submitted to him for settlment, the exceptions of appellant cannot be so amended. Hence, when facts are incorrectly stated, or requests to charge are not properly represented in the case, such errors may be corrected by amendment, but when they are found only in the exceptions, they are beyond the reach of amendment, and therefore cannot be regarded by this court. But as we are always desirous to avoid, if possible, the necessity of resting our conclusions upon points not involving the merits, we are glad to find that there is enough in other portions of the record to enable us to consider the questions which, as we understand, were intended to be raised by the first and second exceptions.

From what is said in the charge of the circuit judge, we infer that the request as stated in the first exception was submitted and refused by him, in the language above quoted from his charge: and, we think, properly refused. The circuit judge, after instructing the jury that, if the note was purchased after maturity, and without notice of any defect that there might be in it, the note would still be, even in the hands of the innocent holder, subject to any defense which such defect might warrant, goes on to add: "But if the maker of the note mixes himself up with it, then the case will stand upon a different ground," and therefore he could not charge, in this case, as requested by the defendant, for he could not charge the latter part of the request, which, in effect, called upon him to instruct the jury that, if the failure of consideration was established, then "the verdict must be for the defendant," as that would ignore the effect of the estoppel to such defense set up by plaintiffs.

As to the second exception, the "case" affords no evidence whatever that any such request was ever submitted to or refused by the circuit judge, and, therefore, under the rule above stated, we could not consider it, unless we can find in some of the other exceptions enough to raise the same questions which we infer the second exception was designed to raise. It seems to us that the object of this exception was to present two questions: (1) Whether the statements made by defendant to plaintiffs, when about to trade for the note, were sufficient to raise an estoppel; (2) Whether it was necessary that such statements should have been made by the defendant with an intent to deceive the plaintiffs, in order to make the estoppel effectual. The third exception may, we think, be construed as raising the first of these questions, and the second is raised by the fifth ex-

ception, when read in connection with the third. The language of the third exception might leave it somewhat doubtful whether its object was to impute error to the circuit judge in charging on the facts—taking questions of fact from the jury—and instructing them, as matter of law, that the evidence submitted was sufficient to establish the estoppel, or whether the purpose was simply to raise the legal questions whether the testimony adduced, if believed, would raise the estoppel; but inasmuch as it is perfectly manifest that the circuit judge, so far from taking any question of fact from the jury, seems to have been particularly careful to leave every such question to the jury, without any intimation as to his own opinion, we presume that the latter was the real object of the exception; and, if so, then it is the same as that proposed by the first branch of the request as stated in the second exception, and the question is properly before us for consideration. The point, then, for us to determine, is whether the representation made by the defendant to the plaintiffs, before they traded for the note, in regard to its character, was, if proved, sufficient to estop him from afterwards denying the truth of the statement then made. In considering this question it would be well to bear in mind the nature of the property in regard to which the statement was made. It was a note, negotiable in form, though it had lost its negotiability—being past due at the time. When a person executes a negotiable note in favor of another, he thereby, in the eye of the law, invites the world at large to trade for it without inquiring into its origin or consideration, and no representation by him is necessary to fix his liability absolutely, no matter how defective the consideration may be. But when such a paper becomes past due, and thereby loses its negotiability, in the full sense of that term, and one wishes to trade for it, he is warned, by the fact that it is past due, that further inquiry is necessary, in order to fix the liability of the maker; and if he takes a transfer without such inquiry, he must bear the consequences, if the maker, when called upon for payment, is able to show that the consideration has failed, or that there is any other valid defense to the note. But if, before taking the transfer, he makes inquiry of the maker, and learns from him that "it is all right," and is thereby induced to make the trade, it would seem that, upon the same principle, he ought to be protected. If the purchaser of a note strictly negotiable is protected because the maker has, by putting such paper in circulation, impliedly represented to any one who may purchase it that it is all right, it does seem that one who has purchased upon a similar representation, expressly made to him by the maker, should be entitled to the same protection. Any other view would operate a fraud on the purchaser, whether so intended or not.

It is urged, however, that a representation to raise an estoppel must be a statement of existing or past facts, and not of something in the future—not a mere statement of opinion or intention; and it is argued that the statement relied on here was of the latter character. We do not so understand it. The defendant must necessarily have known, when the plaintiffs inquired of him, with a view to purchase of the note, whether it was all right, that their object was to ascertain whether he had any defense or offset to it, and his reply can only be construed to be an assurance that he had none. The additional remark—"I expect to pay it in January"—relied on to show that the representation made was nothing more than a declaration to do something in the future, cannot be so construed, in the connection in which it was used. If this remark stood alone, then, possibly, it might be so construed, though even then, when made in response to the inquiry whether the note was all right, it would be more properly construed as an assurance of the highest kind that the note was all right, and because it was all right he expected to pay it. But when considered in the connection in which it was used, we think it clear that the purpose of the additional declaration of an expectation to pay it in January was simply to intensify his previous statement that the note was all right. We cannot doubt that the defendant intended, at the time, by his reply to the inquiries made of him, to assure the plaintiffs that, so far as he was concerned, they would be entirely safe in trading for the note. Again, it is urged that the representation to raise an estoppel must be made with knowledge of the facts, and that here the defendant did not, at the time the representation was made, know the facts upon which he bases his defense of failure of consideration, inasmuch as he had not then had the animal in his possession long enough to ascertain whether he would come up to the warranty. But he did know that the note was given for the purchase money, in part, of the jackass; he knew the nature of the warranty upon which he had made the purchase; he knew the time that it would require to enable him to ascertain fully whether the animal would come up to the warranty; and he must have known that the object of the plaintiff's inquiry was to learn whether there was any defect in the note before they traded for it. Knowing all these facts, if his intention had then been to make his liability depend upon the results of the season's operations, he could not have correctly answered as he did. He could not have answered, "Yes, the note is all right," if the question as to whether it was all right was to depend upon a future contingency. The only proper answer he could have given, under the supposition made, would have been: "I cannot now say whether it is all right or not, as that will depend upon the result of the season's operations." Instead of this, he makes an explicit declaration, without any qualification whatever, that the note was all right, and emphasizes it by an expression of his purpose to pay the note on the first of January—but a very short time after the statement was made, and probably before he could have

fully ascertained whether the jackass would come up to the warranty. It seems to us clear that the representation relied on for the purpose of raising the estoppel was amply sufficient; and if, as we must assume from the verdict of the jury, the plaintiffs were thereby induced to trade for the note, the defendant is estopped from setting up the defense of failure of consideration as against these plaintiffs. Having assured them, when they were about to trade for the note, that it was all right, the defendant cannot now, when called upon to pay, be heard to say that the note is not all right.

Our next inquiry is whether the circuit judge was in error in failing to submit to the jury the question whether there was any intentional misrepresentation by defendant to the plaintiffs, any intent on his part to deceive the plaintiffs. Inasmuch as the "case" does not show any request so to charge, its omission cannot be imputed as error. Indeed, we are unable to discover anything in the testimony which would render such an inquiry pertinent, for we see nothing that even tends to show that the defendant had any intent to deceive the plaintiffs. This being so, the question whether it was necessary that there should be an intent to deceive, may possibly be raised under the general terms of the third exception. We will proceed, therefore, to inquire whether, in the absence of any intent to deceive, the circuit judge was in error in instructing the jury that the evidence, if believed, was sufficient to raise the estoppel. It must be admitted that upon this question there is a conflict of authority, as may be seen by reference to the cases cited in the ingenious argument of the counsel for appellant. This question has been so fully and satisfactorily discussed in the case of Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111, that we shall content ourselves with a simple reference to it, not so much for the point there actually decided, as for the elaborate review of the authorities, where, we think, it is shown that the weight of the more recent authority, both in England and this country, is in favor of the proposition that the intent to deceive is not an essential element in raising an estoppel. That case, it is true, is questioned in the subsequent case of Kinney v. Whiton, 44 Conn. 262, 26 Am. Rep. 462, but only in so far as it holds "that a person who gets at second-hand a declaration not intended for the public, and not intended for him, may act upon it as safely as the person to whom it was addressed, and for whom alone it was intended." And this qualification of the preceding case is placed upon the ground that, "where the declaration was intended only for the person to whom it was addressed, the party making it has assumed no obligation to any other person. A by-stander, who casually overhears a conversation, has no right to appropriate to himself, without further inquiry, what was intended for another." Here the representation was made to the plaintiffs directly, unquestionably with the expectation that they would act upon it, as they did do, and to permit the defendant now to repudiate such representation, would operate a fraud on the plaintiffs, whether so intended or not.

We are unable to discover anything in the "case" which would serve as a basis for the sixth exception; nothing to show that any motion for a new trial, upon any ground, was ever submitted to the circuit judge.

The fourth exception cannot be sustained. In Big. Estop. 532, it is said: "As it is not necessary, clearly, to plead an estoppel *in pais*, in the absence of a statute, there is little to be said on the subject." We have no statute requiring it to be pleaded. Indeed, under the system of code pleading, we do not well see how the estoppel could be pleaded in a case like this. The plaintiff could not by reply do so, as that pleading is only permissible where a counterclaim is set up by the answer, or where the court, in its discretion, may, on the defendant's motion, require a reply, which was not the case here.

The seventh exception, as has been often held, is too general to require any further notice.

The judgment of this court is that the judgment of the circuit court be affirmed.

NOTE.—The contention of the complainant in the principal case was that, in order to create an estoppel *in pais*, there must have been an intention on the part of the person sought to be estopped to deceive or defraud at the time he performed the acts complained of. But the majority of the decisions do not concur with this view. The doctrine of fraudulent intent is only conceded to be applicable in order to create an estoppel *in pais* in cases affecting the title to real estate.[1]

The doctrine that a fraudulent intent is essential in order to create an estoppel *in pais* was declared by Justice Field in Boggs v. Merced. Min. Co.[2] as follows: That, in order to estop a party by his conduct, admissions or declarations, the following are essential requisites: It must appear: 1. That the party making his admission, by his declaration or conduct, was apprised of the true state of his own title. 2. That he made the admission with the *express intention to deceive* or with such careless or culpable negligence as to amount to constructive fraud. 3. That the other party was not only destitute of all knowledge of the true state of the title, but all means of acquiring such knowledge. 4. That he relied directly upon such admissions, and will be injured by allowing the truth of such admission to be disproved.

The doctrine thus announced has been adopted in a number of cases as a general rule upon the subject of estoppel.[3] But it will be seen by examination of the case in which Justice Field announced this opinion that it was not intended to be a general rule upon estoppel. He was discussing the particular question, when is the owner of land precluded by his conduct

[1] 2 Pom. Eq. § 807.

[2] 14 Cal. 279, 367, 368.

[3] Martin v. Zellerbach, 38 Cal. 300; Dorlaque v. Cress, 71 Ill. 381; Hazlett's Admrs., 33 Pa. St. 307; White v. Langton, 30 Vt. 599; Opinion of Welch, J., in McKenzie v. Steele, 18 Ohio St. 4; Plummer v. Lord, 9 Allen, 455; Hawes v. Marchant, 1 Curtis C. C. 144; Andrews v. Lyons, 11 Allen, 349.

from setting up his legal title? In formulating the rules above quoted he did not announce them as governing all cases of equitable estoppel; he expressly confined them to the class of cases under discussion. He quoted,[4] which clearly indicates the doctrine which the judge was following. However, in Brant v. Virginia Coal Co.,[5] the same judge said "that it is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud by which another has been misled to his injury." * * "The element of fraud is essential, either in the intention of the party estopped or in the effect of the evidence which he sets up."[6]

In commenting on this opinion, Judge Pomeroy says:[6] "With great deference to the opinion of so able a judge, I think his error in this respect is evident. It consist in making a special rule, established from motives of policy for a particular condition of fact, and raising it to the position of a universal rule. Leading authors on evidence say that a man is estopped when he has done or permitted something to be done which the law will not allow him to gainsay, and that the law is not so unjust or absurd as it has been represented to be. Its foundation rest partly on the obligation to speak and act in accordance with truth, by which every honest man is bound, and partly on the policy of the law, which thus seek to prevent the mischiefs that would inevitably result from uncertainty, confusion and want of confidence, were men permitted to deny what they had deliberately asserted and received as true."[7]

Pomeroy, however says that when all the varieties of equitable estoppel are compared it will be found that the doctrine rests upon the following principle: That when one of two innocent persons that is guiltless of an intentional, moral wrong, must suffer a loss, it must be borne by that one of them who by his acts or omission has rendered the injury possible. That this most righteous principle is sufficient and alone sufficient to explain all instances of such estoppel, and although fraud may be and often is an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its true and legal meaning.[8]

The same author, in laying down the essential of estoppel, as hereafter stated, says, "that one caution is necessary and very important. It would be unsafe and misleading to rely on these general requisites as applicable in every case, without examining the instances in which they have been modified or limited." The following are the essentials as he gives them: 1. There must be conduct, acts, language or silence, amounting to a representation or a concealment of material facts. 2. These facts must be unknown to the other party claiming the benefit of the estoppel, at the time of his said conduct, or at least the circumstances must be such that knowledge is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of such estoppel at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped, that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. 5. The conduct must be relied upon by the other party, and thus relying he must be led to act upon it. 6. He must, in fact, act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego, or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. It will be seen that fraud is not given as an essential requisite in the foregoing statement.

And, closing his discussion on this subject, the same author makes use of the following positive language: "I would again remark that, although fraud is not an essential element of the original conduct working the estoppel, it may with perfect propriety be said that it would be fraudulent for the party to repudiate his conduct and assert a claim or right in contravention thereof."[9]

In Blair v. Wait,[10] the court said: "It is not necessary to an estoppel that the party should design to mislead. It is enough if that was calculated to mislead and actually did mislead the defendants, while acting in good faith and with reasonable care and diligence, and that thereby they might be placed in a position which would compel them to pay a demand which they had every reason to believe was cancelled and discharged."

In Stevens v. Dennett,[11] Foster, J., after reciting the essential elements, according to what he calls "the common definitions," and substantially as given above, adds: "The doctrine seems to be established by authority that the conduct and admission of a party operate against him in the nature of an estoppel wherever in good conscience and honest dealing he ought not to be permitted to gainsay them. Thus, negligence becomes constructive fraud, although strictly speaking, the actual intention to mislead or deceive may be wanting and the party may be innocent, if innocence and negligence may be deemed compatible. In such cases the maxim is justly applied to him, that when one of two innocent persons must suffer, he must suffer who, by his own acts occasioned the confidence and loss."

In Freeman v. Cooke,[12] Parke, B., said: "The rule laid down in Pickard v. Sears was to be considered and established, but that by the term wilfully in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man will take the representations to be true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission when there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth may often have the same effect."

In Continental Bank v. Bank of Commonwealth,[13] Folger, J., said: "We hold that there need not be,

[4] Adams' Eq., p. 151, and Story's Eq. Jur. § 391.
[5] 3 Otto, 326.
[6] 2 Pom. Eq., p. 270, note.
[7] Taylor on Ev. (8th ed.), p. 112; Greenl. on Ev. § 22.
[8] 2 Pom. Eq. 262.
[9] 2 Pom. Eq. 266.
[10] 69 N. Y. 116.
[11] 51 N. H. 324, 330.
[12] 2 Exch. 654.
[13] 50 N. Y. 575, 581, 582.

upon the part of the person making the declaration or doing an act with the intention to mislead the one who is induced to rely upon it."

The decision in the principal case upon this part of the question involved is certainly in accordance with the great variety of decisions upon the question. The case of Horn v. Cole,[14] referred to in the principal case, the judge, in delivering the opinion, makes a very thorough and masterly examination of the question relating to the fraudulent intent necessary to create an estoppel *in pais*. I would refer the reader to that case and to the citations herein made to Pomeroy's most excellent work upon Equity Jurisprudence for a thorough exemplification of this subject. An exceedingly interesting article upon the knowledge required in estoppel by conduct will be found in 12 Cent. L. J. 29, and also 4 Cent. L. J. 183. The following cases affirm the doctrine of the principal case.[15]

Upon the question whether an estoppel *in pais* must be pleaded, in order to take advantage of a recent edition of Taylor on Evidence,[16] says that, "with respect also to estoppels *in pais*, no doubt can be entertained but that they in general need not be pleaded in order to make them obligatory. WM. M. ROCKEL.

[14] 51 N. H. 287; s. c., 12 Am. Rep. 111.
[15] Wearing v. Somborn, 82 N. Y. 604; Hurd v. Kelly, 78 N. Y. 597; Maloney v. Horan, 49 N. Y. 115; Trenton Banking Co. v. Shearman, 24 Alb. L. J. 390; Morgan v. Railroad Co., 6 Otto, 616; Rice v. Bunce, 49 Mo. 234; McCabe v. Ranney, 32 Ind. 309; Clark v. Coolridge, 8 Kan. 195.
[16] 8th ed., p. 113.

INSURANCE—LAPSED POLICY—REVIVAL—APPLICATION.

METROPOLITAN LIFE INSURANCE COMPANY V. MCTAGUE.

Supreme Court of New Jersey, June 15, 1887.

Where a life insurance policy has become forfeited for non-payment of premiums and a revival application is made, in which the applicant makes farther representations and warrants their truth and the truth of those made in the original application, and such policy is revived according to the terms of the application, it is *held*: 1. That, upon such assent, the original contract, with all its terms, became reinstated, and there was also incorporated into the contract, which then arose, the new terms expressed in the revival application, and thereby the representations therein contained became part of the contract, and that the truth of each was warranted. 2. That a statement in the revival application, that insured had not, during the period covered thereby, been "sick or afflicted with disease," was not necessarily to be inferred to be false from the fact that insured had "a cold." 3. But a statement that insured had not "consulted or been prescribed for by a physician" was shown false by proof of such a prescription, although it appeared to have been given for "a cold," and the nature of the prescription did not appear.

MAGIE, J., delivered the opinion of the court: The action in the district court was founded on a policy of life insurance, dated April 14, 1884, whereby the Metropolitan Life Insurance Company agreed, if certain premiums were paid, to pay to Annie McTague a certain sum on the death of John McTague, her husband. The judgment of the district court was in favor of Annie McTague, and it was affirmed on appeal. It appealed. It appears by the state of the case that the policy in question originally issued upon the application of Annie McTague. It was averred in the policy that the contract was made in consideration of the representations contained in the application, which was therein "referred to and made part of this contract." The policy further stipulated that, if the representations were not true, the contract should be void. By force of these stipulations, the application, and the representations thereby made, were incorporated into the completed contract of insurance, and the truth of the representations was warranted. If false, although in immaterial particulars, the contract would be avoided. Dewees v. Manhattan Ins. Co., 34 N. J. Law, 244; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, and 44 N. J. Law, 208; Cushman v. United States Life Ins. Co., 63 N. Y. 404; Phœnix Mut. Life Ins. Co. v. Raddin, (United States Supreme Court,) 23 Reporter, 353, 7 Sup. Ct. Rep. 500; McDonald v. Law Union Ins. Co., L. R. 9 Q. B. 328.

The contract thus made became forfeited by the failure to pay the weekly premiums as agreed. Afterwards, and on February 12, 1885, Annie McTague signed and delivered to the company a written application called a "Revival Application." It described the forfeited policy, admitted that the weekly premiums had remained unpaid for 31 weeks, and contained the following, viz.:

"The undersigned assured hereby declares and warrants that the life heretofore insured under the above-numbered policy has not, since said policy was issued, been sick, or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate. Said policy having lapsed, the undersigned desires to renew the same, and herewith pays the premiums in arrears, with the understanding that no liability exists on the part of the company until said company, at its home office in New York city, shall have assented to the revival of said policy, and so notified its agent first above named; nor shall said policy be deemed to be in force, unless, upon the date of its revival by the company, at its home office as aforesaid, the said insured shall be alive and in sound health. It is further warranted that the statements in this and the original application are in all respects true; otherwise the insurance will be void, and all payments made will be forfeited to the company.

"Agent's or Physician's Signature, ——,

"(After satisfying himself of the identity of the proposed insured.)

"First class, should be unexceptionable lives; second class, lives in which the unfavorable circumstances are very slight; third class, lives in which the unfavorable circumstances are serious, and require a considerable reduction in the

amount proposed, as an equivalent for the increased risk of the assurance; fourth class, lives where the objections are such as to render it inexpedient to undertake the assurance."

The company assented to the revival of the policy by an approval of the revival application annexed thereto, and signed by one of its officers. It notified the agent referred to, and received the premiums in arrears, and those which subsequently fell due up to the death of John McTague, which occurred September 9, 1885. It now disputes its liability upon the policy on the ground that statements contained in the revival application were untrue.

The question thus raised requires us to determine what contract existed between the parties after the policy was revived, and the relation to that contract of the revival application and its representations. The forfeiture of such a policy by non-payment of premiums may be waived, and such waiver will generally be inferred from a receipt of the premiums after forfeiture. Upon such a waiver the pre-existing contract doubtless becomes reinstated upon its original terms. Such a forfeited policy may also be expressly revived, and in such case the revival may be upon such terms and conditions as the parties agree to. When an express revival is made upon the statements of the original application, it has been made a question whether the truth of those statements is to be tried by the circumstances existing at the time of the original application, or at the time of the revival. Bliss, Life Ins. § 194. Mr. May says that the authorities do not agree; some taking the view that a revival makes a new contract, and others that it merely continues the old one. He expresses his opinion that special circumstances seem to control the decision according as they indicate the intent of the parties. May, Ins. § 190. In like manner, the parties may doubtless agree to revive the lapsed contract upon new terms and conditions, or upon its original terms and conditions, with such additional terms as they mutually agreed to incorporate therewith. Whether the parties merely reinstate the old and forfeited policy, or create a new contract on new terms, or revive the lapsed contract with additional terms, must be determined from the circumstances. In the case before us, it is clear, in my judgment, that the intent of the parties was to revive the forfeited policy, with all its original terms, by a new contract, which incorporated into its additional terms. This appears from the circumstances. The original policy was based on a written application containing statements as to the insurability of the person whose life was to be insured. These statements were expressly incorporated into the contract, and warranted to be true. When forfeiture had occurred, the beneficiary in the lapsed contract applied in writing for its revival. The application contained statements as to the insurability of the person whose life was insured, covering the period between the issuing of the original policy and date of the revival application. It further contained an agreement that the company's liability should only rearise upon its assent to the application. It contained an express warranty of the truth of the representations then made, and an agreement that if they, or the representations of the original appplication, were not true, the contract should be void. This written application was assented to by the written approval of the company, and thereby a new contract between the parties was made, reviving the old policy with all its terms, and incorporating into it the additional terms expressed in the revival application. By these means the representations contained in the revival application became part of the completed contract between the parties, and their truth was warranted. The falsity of any of them will avoid the contract.

Two representations in the revival application are alleged to have been false. The first was that which averred that John McTague had not, since the policy was issued, been "sick or afflicted with any disease." The district court found as a fact that he had, during that period, had "a cold." The common pleas held that the statement of the application was not thereby shown to be untrue. In this, I think, there was no error. There was nothing in the mere fact found that required the inference that the insured life had been "afflicted by disease" or even "sick." These terms are not to be construed as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness. Where a lapsed policy was revived on condition that the insured was in good health, it was held that the phrase was not to be construed as meaning an absolute exemption from any physical ill; and, as the policy had issued on an application showing the then state of health of the insured, it was further held that the condition was satisfied by the insured being in a state of health relatively like that represented in the original application. Peacock v. New York Life Ins. Co., 20 N. Y. 293. See, also, Cushman v. United States Life Ins. Co., 70 N. Y. 77. Whether this view be approved or not, I am of opinion that, in the absence of proof that the "cold" referred to produced disease or sickness, the courts below rightly held that the falsity of statement in question was not shown. Nor do I think that the fact that the insured had been prescribed for by a physician necessarily required the inference that the cold produced either disease or sickness.

The other statement alleged to be proved false is that which averred that John McTague had not, within the period between the issuing of the policy and the date of the revival application, "consulted or been prescribed for by a physician." The fact found by the district court was that a physician had been called on by John McTague, or had visited him, and had prescribed for him for the "cold." The common pleas, in their opinion before us, declared that this fact did not show the representation to have been false, because it did not appear what sort of a prescription

the doctor gave—whether one compounded by a druggist, or made up of some common remedy. But it is obvious that this circumstance cannot be of the least importance in determining the truth or falsity of the representation in question. That representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician, or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem to be to the contract proposed by the application that, in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question; for, as we have seen, its truth is warranted. Its falsity appears from the fact found.

The result is that the contract was avoided, and the court below erred in rendering judgment thereon. The judgment must be reversed.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACCOUNTING—Arbitration.——Where two persons are selected by parties to adjust accounts between them, but without power to decide what one of such parties owed the other, such persons are not arbitrators, nor is their statement an award, and it does not bar a suit by either party.—*Whitehead v. Darling*, Ky. Ct. App., Sept. 22, 1887; 5 S. W. Rep. 356.

2. AGENCY—Commissions of Agent.——When principals engage an agent to perform certain services, his commissions to be paid out of the fruits of such service, and he does perform and the money is ready for the principals, who refuse to draw it because of dissensions among themselves, the agent may maintain an action to recover his compensation.—*Brady v. Stillman*, U. S. C. C. (N. Y.), Aug. 10, 1887; 31 Fed. Rep. 791.

3. APPEAL—Intermediate Judgment — Continuance.—An order that a cause remain on the docket until a report shall come in and until the further order of the court, is a mere continuance, and not an intermediate judgment from which an appeal can be taken.—*Morgan v. Keenan*, S. C. S. Car., Aug. 18, 1887; 3 S. E. Rep. 297.

4. ASSIGNMENT — Notice — Garnishee — Process. —— Where a creditor has assigned his debt to another person, and in writing directed the debtor to pay the debt to a named party (the assignee), and the debtor does pay part to the assignee, and the remainder upon garnishee process to a creditor of the assignor: *Held*, that such debtor is liable for such balance to the assignee, and that the written directions of the assignor were sufficient notice to him of the assignment.—*Whitman v. Winchester, etc. Co.*, S. C. Err. & App. Conn., Sept. 9, 1887; 10 Atl. Rep. 571.

5. ATTACHMENT—Return—Lien—Statute.—— The return of a sheriff on an attachment set forth in full, and *held* to be sufficient, under the statutes of Kentucky, to fix the lien of the attachment upon the land attached.—*White v. O'Bannon*, Ky. Ct. App., Sept. 17, 1887; 5 S. W. Rep. 346.

6. BOND—Indemnity — Construction. ——A bond reciting that a railroad was a customer of a bank, and would make overdrafts on the bank and guaranteeing the payment of all such overdrafts: *Held*, to include liability, not only for technical overdrafts, but also overdrafts against proceeds of notes discounted for the company by the bank.—*Ætna Nat. Bank v. Hollister*, S. C. Err. & App. Conn., Dec. 20, 1886; 10 Atl. Rep. 550.

7. CARRIER—Province of Jury—Due Care.——In an action for personal injuries it is the province of the jury to decide whether the carrier has exercised due care. It is, therefore, error, to charge as a matter of law that it is the duty of the conductor to assist aged or infirm passengers to alight from the train.—*Simms v. South Carolina, etc. Co.*, S. C. S Car., Sept. 20, 1887; 3 S. E. Rep. 301.

8. CONTRACT—Evidence Varying Written Contract.—An administrator sold land and took a note for the purchase money, agreeing verbally that the note need not be paid, but that the amount would be credited on a probated account against the estate: *Held*, that the verbal contradicted the written contract, and was void.—*Bishop v. Dillard*, S. C. Ark., June 25, 1887; 5 S. W. Rep. 341.

9. CORPORATION — Judgment — Execution. —— An academy sued without alleging that it was a corporation, obtained judgment and issued an execution. In a suit in equity by defendant to restrain the collection of the judgment, he having conceded that the academy *was* a corporation, it was held that the collection of the execution could not be restrained.—*St. Cecelia Academy v. Hardin*, S. C. Ga., Feb. 27, 1887; 3 S. E. Rep. 305.

10. COSTS.——In New Hampshire, questions of costs are not reviewable upon appeal, unless they are specially reserved in the trial court.—*Nutter v. Varney*, S. C. N. H. July 15, 1887, 10 Atl. Rep. 615.

11. CRIMINAL LAW— Bigamy — Jurisdiction. —— The courts of Kentucky have no common law jurisdiction of the offense of bigamy where the second marriage was contracted in Tennessee.—*Johnson v. Commonwealth*, Ky. Ct. App., Oct. 1, 1887; 5 S. W. Rep. 365.

12. CRIMINAL LAW—Instructions.——It is not error for the court in a trial for larceny to omit to expound to the jury the meaning of the word "feloniously," although it uses that word in the instruction. Where a court instructs the jury upon two different hypotheses as to the facts, each of which is sustained by some evidence, the defendant cannot complain that they are contradictory, each being as favorable to him as he can require.—*Hamlet v. Commonwealth*, Ky. Ct. App., Oct. 1, 1887; 5 S. W. Rep. 366.

13. CRIMINAL LAW—Robbery—Larceny.——Under an indictment for robbery, a defendant may be convicted of simple larceny.—*Sullivan v. Commonwealth*, Ky. Ct. App., Oct. 1, 1887; 5 S. W. Rep. 365.

14. CRIMINAL PRACTICE — Arraignment — Twice in Jeopardy.——If a trial for murder is begun without arraignment or plea, the jury sworn and a witness examined and cross-examined, the court may, nevertheless, begin the trial *de novo* and proceed with it regularly, and it is *held* that the defendant is not prejudiced

by the irregularity nor put twice in jeopardy.—*Disney v. Commonwealth*, Ky. Ct. App., Sept. 29, 1887; 5 S. W. Rep. 360.

15. CRIMINAL PRACTICE—Indictment—Verdict.— The verdict of a jury convicting a defendant of one of two offenses, charged in the same indictment, will not be set aside on the ground that two offenses are charged. —*Scolf v. Commonwealth*, Ky. Ct. App., Sept. 20, 1887; 5 N. W. Rep. 361.

16. DAMAGES—Carrier—Detention.—— Where a carrier of cattle refused to deliver them upon demand of the owner because he would not pay an unfounded claim for demurrage, and pending the detention the market price of cattle declined, the carrier is held responsible in damages therefor.—*Goldsmith v. The Suffolk*, U. S. D. C. (Md.), Feb. 23, 1887; 31 Fed. Rep. 835.

17. DEDICATION—Plats of Lots—Streets.——Dividing land into lots with streets and alleys, and selling such lots with reference to plats or maps showing such streets and alleys, is conclusive evidence of a dedication of such streets and alleys to public uses. A deed conveying a lot and calling for a street as a boundary, conveys the land to the center of the street, subject to the use of the public as a street.—*Schneider v. Jacob*, Ky. Ct. App., Sept. 22, 1887; 5 S. W. Rep. 350.

18. EASEMENT—Drainage—Express and Implied Grant. ——A grant of an easement carries with it whatever is necessary to its beneficial enjoyment, if in the power of the grantor. But a grant of drainage across premises named in the deed does not convey with it the right to continue the drains to the sea over other lands of the grantor not named in the deed.—*Fiske v. Wetmore*, S. C. R. I., March 28, 1887; 10 Atl. Rep. 627.

19. ELECTION—Jurisdiction—Statutes. —— Where, in an election held under a State law, at which election a member of congress is voted for, a violation of the State law with respect to the custody of poll books, certificates, etc., and any other fraud in the election is also a violation of the laws of the United States, and the district court of the United States for the proper district has jurisdiction of such offense.—*In re Coy*, U. S. C. C. (Ind.), July 16, 1887; 31 Fed. Rep. 794.

20. EQUITY—Injunction.——A complainant is not entitled to an interlocutory injunction where the legal right upon which his claim to relief rests, depends upon a disputed point of law.—*Delaware, etc. Co. v. Central, etc. Co.*, N. J. Ct. Ch., Sept. 12, 1887; 10 Atl. Rep. 602.

21. EVIDENCE — Trespass — Declaration of Former Owner.——Where, in an action of trespass upon lands, the defendant claimed under a devise, evidence is admissible that the testator under whom defendant claimed had declared that he did not own the land in controversy alleged to have been trespassed upon, but that the land devised was other land.—*Potter v. Waite*, S. C. Err. & App. Conn., July 2, 1887; 10 Atl. Rep. 563.

22. EXECUTORS—Bond—Married Woman—Statute.— A testator appointed a married woman co-executrix of his will, and exempted his executors from giving security on any bond: *Held* that, under the law of Rhode Island, a personal bond is required in such cases, and that a married woman cannot give such a bond.—*Hammond v. Wood*, S. C. R. I., July 16, 1887; 10 Atl. Rep. 623.

23. HOMICIDE—Dying Declarations. —— Where one wounded mortally says, in reply to a question, "I am killed," and further being asked who did it, replies, giving the name of the defendant, and adds, "we had no fuss:" *Held*, that these statements, including the last, are admissible as dying declarations.—*Luker v. Commonwealth*, Ky. Ct. App., Sept. 22, 1887; 5 S. W. Rep. 354.

24. HOMICIDE — Location of Wound — Instruction — Province of Jury.——In a case of homicide, where a wound was inflicted on the front of the head and another on the back of the head, the trial court properly refused to locate the fatal wound by an instruction to the jury, holding it to be the province of the jury to do so.—*Weeks v. State*, S. C. Ga., March 18, 1887; 3 S. E. Rep. 323.

25. HUSBAND AND WIFE—Dower — Antenuptial Contract.——A woman who is *sui juris* may, by antenuptial contract and in the absence of fraud, relinquish dower and all claim to a distributive share in her husband's estate, and the subsequent marriage is a sufficient consideration for such a contract.— *Forwood v. Forwood*, Ky. Ct. App., Oct. 1, 1887; 5 S. W. Rep. 361.

26. HUSBAND AND WIFE—Practice — Appeal — Amendment.——Where the administrator of a wife presents a claim against the estate of the husband for money loaned to him by her, and upon the claim being disallowed by the commissioners and an appeal taken to the superior court: *Held*, that the court might well permit an amendment showing that the husband received the money as trustee of the separate estate of the wife, and was liable as such trustee.—*Comstock's Appeal*, S. C. Err. & App. Conn., April 1, 1887; 10 Atl. Rep. 559.

27. HUSBAND AND WIFE—Separate Estate—Trust.—— Land was held by a husband as trustee for his wife and children, and he gave notes for supplies, stating in the notes that they were given by him as trustee for the property. Suit being brought on the notes, no process being served upon wife or children, judgment was rendered against the husband. The wife had died: *Held*, that the court would enjoin the sale of the interests of the children in the land in satisfaction of the judgment, but that the interest of the husband was liable therefor.—*Pearson v. Denham*, S. C. Ga., April 19, 1887; 3 S. E. Rep. 336.

28. HUSBAND AND WIFE—Statute—Assumpsit.——Under existing statutes of Vermont, *assumpsit* can be sustained against a husband and wife upon joint promises by both, made either before or after coverture, and the common counts will be held sufficient on demurrer.— *Heed v. Newcomb*, S. C. Vt., Sept. 24, 1887; 10 Atl. Rep. 598.

29. INDICTMENT—Essential—Swindling.——An indictment for swindling is fatally defective if it fails to allege that the party defrauded was induced to part with his property by the false pretenses charged in the indictment.—*Hightower v. State*, Tex. Ct. App., June 4, 1887; 5 S. W. Rep. 313.

30. INJUNCTION—Criminal Law.——A court of equity cannot interfere by injunction with proceedings in courts of common law for the punishment of crimes and offenses.—*Suss v. Noble*, U. S. C. C. (Iowa), August, 1887; 31 Fed. Rep. 855.

31. INSURANCE—Agent—Agreement.——Where an insurance agent, clothed with apparent authority, takes a note for a premium and agrees in writing that if the policy shall be rejected the note will be returned, the company is bound by his action, and cannot sue on the note after rejecting the policy.—*Jacoway v. German, etc. Co.*, S. C. Ark. July 2, 1887; 5 S. W. Rep. 339.

32. JUDGMENT—Will—Decree—Res Judicata.—— The will of A was offered for probate in the probate court of C, which decided that A was not a resident of C. The supreme court on appeal decided that the paper was not the will of A. Application was made to have the will probated in W: *Held*, that the application was barred by the judgment of the supreme court on the merits. It was *res judicata*.—*Thornton v. Barrett*, S. C. R. I., July 9, 1887; 10 Atl. Rep. 617.

33. JURISDICTION—Injunction—Removal of Causes.— A federal court has no jurisdiction to stay proceedings in a State court by injunction, unless the case is one which has been duly removed from the State to the federal court, and the power will not be exercised if the federal jurisdiction is doubtful.—*Wagner v. Drake*, U. S. D. C. (Iowa), August, 1887; 31 Fed. Rep. 849.

34. JUSTICE OF THE PEACE—Jurisdiction—Statute.— Construction of Arkansas statute, under which a justice may discharge a jury which cannot agree. After a trial on the merits before a justice, his jurisdiction cannot be questioned for the first time in the circuit court upon appeal.—*Sheeler, etc. Co. v. Donahoe*, S. C. Ark., July 2, 1887; 5 S. W. Rep. 342.

35. LANDLORD AND TENANT—The lessor and lessee of defective premises, both being fully aware of the de-

fect, are jointly liable in damages to a person who is injured by such defect.—*Joyce v. Martin*, S. C. R. I. July 16, 1887; 10 Atl. Rep. 620.

36. LEGACY—Abatement—Priority—Burden of Proof. ——Where there is a deficiency of assets all general legacies must be abated and paid proportionately, but if there is a legacy given in consideration of the relinquishment of a claim, or of dower, that legacy must be paid in full and the others bear all the abatement. The burden of proof in such case is on the legatee.—*Duncan v. Inhabitants of Town of Franklin*, N. J. Prerog. Ct., May Term, 1887; 10 Atl. Rep. 546.

37. LIBEL—Libelous Epithets—Rule as to Instructions.——It is libelous for a newspaper to charge a real estate agent with compelling a colored tenant to sell out his business. "An old skunk," applied to a man, is a libelous epithet. It is proper for a court to refuse to charge that in cases of prosecutions for libel, the truth of the charge may be given in evidence if it does not appear that any evidence tending to prove the truth of the charge had been offered on the trial.—*Pledger v. State*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 320.

38. LIMITATIONS—Adverse Possession.——A road-bed had been closed by county commissioners for twenty-eight years. Circumstances stated sufficient to show that defendants had held adverse possession of it for over twenty years.—*Sadler v. Peabody, etc. Co.*, Md. Ct. App., June 24, 1887; 10 Atl. Rep. 599.

39. MALICIOUS PROSECUTION—Want of Probable Cause. ——In an action against several for malicious prosecution it need be alleged that the defendants conspired to prosecute. The gist of the action is the damage, not the conspiracy. Ruling as to what does and what does not constitute probable cause.—*Jenner v. Carson*, S. C. Ind., Sept. 21, 1887; 13 N. E. Rep. 44.

40. MECHANIC'S LIEN — Subcontractor — Notice. —— Construction of Connecticut statutes relating to mechanic's liens, the rights of subcontractors under those statutes, and the notice of such liens which must be given to the owner of the property.—*Kenney v. Blackmer*, S. C. Err. & App. Conn., September, 1887; 10 Atl. Rep. 568.

41. MORTGAGE—Attestation—Employee—Record.—— The attestation of a mortgage to a corporation by one of its employees and another person is sufficient to admit it to record, or in evidence.—*Conley v. Campbell, etc. Co.*, S. C. Ga., March 22, 1887; 3 S. E. Rep. 335.

42. MORTGAGE—Equity of Redemption.——A mortgagee who has obtained a decree of foreclosure lets in the equity of redemption by getting a judgment against his debtor for the full amount of his debt.—*Clarke v. Robinson*, S. C. R. I., July 23, 1887; 10 Atl. Rep. 642.

43. MORTGAGE — Foreclosure — Release.——Where a mortgage is given to secure the payment of certain overdrafts, it was *held* that a permission given to withdraw certain deposits did not operate to release the lien of the mortgage for the overdrafts made at the time of its execution, nor let in a junior mortgage.—*Sawyer v. Senn*, S. C. S. Car., Aug. 22, 1887; 3 S. E. Rep. 298.

44. MORTGAGE—Interest Installments—Foreclosure—Bona Fide Purchaser.——Where, in Illinois, a mortgage is given to secure the payment of notes, which contains a covenant that the principal shall become due upon default of payment of any interest installment, the right to foreclose in such case vests in a *bona fide* purchaser of such notes and mortgage before maturity and for value, regardless of such equities as may exist between the original parties. And this rule applies, although by the original contract the maturity of the debt was very remote.—*Swett v. Stark*, U. S. C. C. (Ill.), August, 1887; 31 Fed. Rep. 858.

45. MORTGAGE — Redemption — Estoppel.——If, in a foreclosure suit, a conditional judgment is rendered for the amount assumed to be due on all the mortgage notes, and the mortgagor pays off such judgment and redeems the land, such payment estops the mortgagee in a subsequent foreclosure suit on a note not included in the judgment.—*Brown v. West*, S. C. N. H., July 15, 1887; 10 Atl Rep. 515.

46. NEGLIGENCE—Contributory Negligence—Damages—Assets—Life Insurance—Statute.——An act done by a passenger to avoid an impending danger is not contributory negligence, although it may have, from error of judgment on his part, actually contributed to the disaster. In Oregon, damages recovered by an administrator for the death of his intestate are assets of the estate. Insurance money for loss of life cannot be set off against the damages recovered by the administrator for the death of his intestate.—*Ladd v. Foster*, U. S. D. C. (Oreg.), Aug. 20, 1887; 31 Fed. Rep. 827.

47. NEGLIGENCE—Damages by Death—Statute—Measure of Damages.——In estimating the damages due to a widow for negligently killing her husband, there is to be considered, under the Georgia statute, not only the situation and needs of the family, but the value of the husband's life, and in this connection his age, habits and occupation.—*Central, etc. Co. v. Rouse*, S. C. Ga., Feb. 8, 1887; 3 S. E. Rep. 307.

48. OFFICER — Deputy Sheriff — Return—Amendment. ——A deputy sheriff may amend his return after the expiration of his term of office, if no new rights founded on the error have arisen and such amendment relates back to the date of the original return and operates therefrom.—*Petition of Lake*, S. C. R. I., Feb. 20, 1887; 10 Atl. Rep. 653.

49. PATENT — Infringement—Foreign Patent—Injunction.——An injunction on account of an infringement of a patent was dissolved because a foreign patent for the same invention had expired and thereby "terminated the life of the domestic patent." The injunction, however, will be restored if it appears that a foreign court of competent jurisdiction had declared the foreign patent to have been void *ab initio*.—*Bate, etc. Co. v. Gillett*, U. S. C. C. (N. J.), Aug. 9, 1887; 31 Fed. Rep. 809.

50. PATENT—Pantaloons—Claim Held Invalid.——Reissued patent, No. 9816, for improvement in the construction of pantaloons, *held*, invalid as to its second claim.—*Patent, etc. Co. v. Glover*, U. S. C. C. (N. Y.), May 14, 1887; 31 Fed. Rep. 816.

51. PATENT—Vulcanizing Apparatus—Valid in Part—Prior Use—Failure to Plead.——The patent issued to Hotchkiss and Allerton, for vulcanizing apparatus, *held*, to be valid only in part. If, in an action for infringement, the answer does not set up prior use of the invention, it may nevertheless be given in evidence in proof of the actual state of the art.—*Stevenson v. Magowan*, U. S. C. C. (N. J.), July 12, 1887; 31 Fed. Rep. 824.

52. PATENTS—Want of Novelty—Unclaimed Feature. ——Patent No. 121,054, for improvement in fruit basket, declared void for want of novelty, and it was held that it could not be validated by a novel feature which was not claimed in the application.—*Ingham v. Pierce*, U. S. C. C. (Mich.), 1887; 31 Fed. Rep. 822.

53. PLEADING—Equity—Cross-bill—Demurrer—Writ of Error.——Where a cross-bill was filed seeking relief against complainant and co-defendants and complainants demurred, but co-defendants neither answered nor demurred, and judgment was rendered on the demurrer, it was held that it was not necessary to make such co-defendants parties to a writ of error brought to review the judgment on the demurrer.—*Fouche v. Harrison*, S. C. Ga., July 5, 1887; 3 S. E. Rep. 330.

54. PLEADING—Joinder of Counts.—— In Vermont, counts in trespass and trover cannot be joined in the same declaration, unless the court is satisfied from the declaration that they relate to the same cause of action.—*Templeton v. Clogston*, S. C. Vt., Sept. 24, 1887; 10 Atl. Rep. 594..

55. PRACTICE — Continuance — Discretion. ——It is a matter of judicial discretion of the trial court to grant or refuse an application for a continmance on the ground of absence of counsel. The supreme court will not reverse a judgment on account of a refusal to continue on such grounds.—*Evansville, etc. Co. v. Hawkins*, S. C. Ind., Sept. 28, 1887; 13 N. E. Rep. 63.

56. REMAINDER — Vested and Contingent. —— The present capacity of taking effect if the possession

should become vacant is the characteristic of a vested remainder, and not the certainty that the possession will become vacant before the estate limited in remainder determines.—*Railey v. Milam*, Ky. Ct. App., Sept. 29, 1887; 5 S. W. Rep. 367.

57. RIPARIAN RIGHTS — Accretion. —— If a river so changes its course as to wash away all the land between its prior bank and the lands of an upland proprietor so as to become the boundary of his land, he becomes a riparian proprietor and entitled to all the rights appertaining to such proprietors. And if, afterwards, the river again changes its course and fills up with deposits the vacuum which it had previously made, such accretions are the property of the new riparian proprietor and not of him whose land was washed away from the space occupied by the accretions.—*Weller v. Bailey*, S. C. Err. Conn., January Term, 1887; 10 Atl. Rep. 565.

58. SEAMEN — Desertion — Shipping Commissioners — Statute.—— Construction of acts of congress relative to shipping commissioners. Those acts held not to be applicable to vessels engaged in coastwise traffic. Liability of seamen employed on such vessels for desertion.—*United States v. Huckley*, U. S. C. C. (Cal.), Aug. 2, 1887: 31 Fed. Rep. 804.

59. SHIPPING — General Average—Repairs.——Where a vessel disabled at sea puts into a port of refuge, all expenses incurred from the moment of changing the course of the vessel to seek such refuge up to the renewal of the voyage, including repairs and wages to seamen, are chargeable to general average.—*Edwards v. The Joseph Farwell*, U. S. D. C. (Ala.), June 6, 1887; 31 Fed. Rep. 844.

60. SURETY—Principal Signing as Surety.——Where a party is the actual beneficiary of a loan of money he is the principal debtor, and if he has signed the note as surety he can have no recourse upon his apparent cosecurity for contribution, such person being in fact a security for him and not for the apparent principal.—*Boulware v. Lewis*, S. C. App. Va., Sept. 15, 1887; 3 S. E. Rep. 289.

61. TAXATION — Municipal Corporations—Assessments —Statutes.——Construction of Georgia statutes conferring taxing powers on the city of Augusta. *Held*, that general enactments of that character do not confer on the city the power to levy special assessments upon property holders.—*City Council of Augusta v. Murphy*, S. C. Ga., May 9, 1887; 3 S. E. Rep. 326.

62. TRADE-MARK. —— Where it appeared that the letters "L L" claimed as a trade-mark on cotton sheeting had been used by others before the plaintiff and were known to the trade to indicate a certain class of goods, it was held that plaintiff was not entitled to the exclusive right to use the letters as a trade-mark.—*Lawrence, etc. Co. v. Tennessee, etc. Co.*, U. S. C. C. (Tenn.) July 1, 1887; 31 Fed. Rep. 776.

63. USURY — Creditor. —— In Georgia, one creditor cannot recover from another usury paid to the latter by their debtor who was insolvent.—*Singleton v. Patillo*, S. C. Ga., Feb. 8, 1887; 3 S. E. Rep. 253.

64. USURY—Renewal of Debt—Injunction.——Where one owing a debt, under an alleged usurious contract borrows money and pays it up in full securing the lender by a deed of trust, the latter transaction was a new obligation, and was wholly unaffected by the alleged illegal character of the first contract. Ruling on the subject of the dissolution of injuctions.—*Vaught v. Rider*, S. C. App. Va., Sept. 15, 1887; 3 S. E. Rep. 293.

65. VENDOR AND VENDEE—Damages—Measure of Damages.——Where a party puchased a tract of land with notice that the vendor had previously agreed to give to a railroad company a right of way for their track and a station and other like grants: *Held*, upon action to enforce the vendor's lien, that the vendee could only claim as damages the average value of the whole tract which was the measure of damages for the land so granted.—*Sergeant v. Linkhouse*, S. C. App. Va., Sept. 15, 1887; 3 S. E. Rep. 295.

66. WAREHOUSE RECEIPTS —Obligation of.—— Warehouse receipts which have only the incidents attached to them by law and are not varied by the contract of the parties have, in the hands of a *bona fide* holder, assignee, for value, no higher obligation than when in the hands of the original bailor.—*Planters', etc. Co. v. Merchants' Nat. Bank*, S. C. Ga., March 25, 1887; 3 S. E. Rep. 327.

67. WILL — Construction. —— Where a testator directed his land to be sold and gave to S a legacy of $1,000, and in a subsequent clause directed that, out of the proceeds of the sale, $1,000 should be paid to a missionary society, S and the society were held entitled to divide the proceeds equally, as they were not sufficient to pay both legacies in full.—*Summer v. Home, etc. Society*, S. C. N. H., July 15, 1887; 10 Atl. Rep. 616.

68. WILL — Construction — Executory Devise. ——A will giving an estate to "my son" absolutely, provided he leaves at his death descendants who can inherit it from him, but if he shall die without leaving such issue, then to "my nephew" or his descedants, etc., is an executory devise and vests in the son a conditional estate liable to be defeated by his death without issue.—*Randall v. Josselyn*, S. C. Vt., Sept. 21, 1887; 10 Atl. Rep. 577.

69. WILL — Devise to Bastard — Public Policy.——A will devising all of testator's property to an illegitimate daughter and her children is not void on the ground of public policy, although the testator was a white man and the devisees all colored, the grandchildren being also illegitimate and the children of a white man.—*Smith v. DuBose*, S. C. Ga., June 13, 1887; 3 S. E. Rep. 309.

70. WILL — Revocation —Statutes—Construction.—— Under the law of Connecticut, marriage or the birth of a child operated a revocation of a will only since the passage of the laws of Conn., ch. 110, § 135. Before that time wills could only be revoked in the manner prescribed by the statute of 1821.—*Goodsell's Appeal*, S. C. Err. Conn., April 1, 1887; 10 Atl. Rep. 557.

71. WITNESS—Disobedience.——A party who is innocent of any fault cannot be deprived of the testimony of a witness who remains in the court room in disobedience of an order of the court to retire during the examination of other witnesses.—*State, ex rel. v. Thomas*, S. C. Ind., Sept. 26, 1887; 13 N. E. Rep. 35.

CORRESPONDENCE.

The proposition laid down by Judge Bruce, in Samuels v. Railroad Co., 31 Fed. Rep. 57, that at common law discrimination is prohibited in favor of one shipper or against another by a common carrier is hardly sustained by authority, and your indorsement of it induces me to call your attention to a decision in England which, so far as is known, has never been overruled, and which clearly and unequivocally repudiates this idea:

"At common law, a person holding himself out as a common carrier of goods, was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage, according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was

evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable. Citing authorities per Blackburn, J., in Great Western R. Co. v. Sutton, 22 L. T. R. (N. S.) 43-45."

It seems to me that the act to regulate commerce was most plainly aimed at this great evil which was beyond the reach of the law as it stood; and it is very much to be regretted that the commission has not thus far been able to construe it so as to make it efficient against these abuses, to correct which it appears to have been enacted. There is a little too much of the "how not to do it" about their decisions to meet the views of those who regard this as highly remedial legislation, and as such entitled to liberal construction in aid of the legislative purpose.

Chicago, Oct. 19, 1887. S. S. G.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 22.

B's store is burned and he assigns $300 in the policy to C. B employs D as his attorney. D gets judgment in circuit court against a mutual insurance company, but D says he cannot collect the money from individual stockholders unless the judgment is assigned to him. Would B be liable in criminal action if he assign judgment to D? A. G.

QUERY NO. 23.

In 1879, J S died intestate and insolvent, seized of a farm of 160 acres, worth less than $2,500, on which he resided at the time of his death, leaving a widow to whom the land was assigned as a homestead, and adult children, his heirs. The intestate had incumbered the land by a mortgage for $1,000, in which the widow had joined, relinquishing her possibility of dower. This mortgage, after the death of the intestate, for a valuable consideration, was assigned to the widow. Can she have present satisfaction of the mortgage debt out of the reversion expectant upon determination of her homestead right without endangering her possession? L.

QUERY NO. 24.

A and B, deputy sheriffs from Mississippi, upon the authority alone of a bench warrant for the arrest of C, cross the Louisiana State line, and finding C, attempt his arrest. C resists and is killed. C is under indictment in Mississippi for murder, and has been a fugitive, of dangerous character, for years, and frequently, in evading arrest, crossed into the other State. A and B are now charged with his murder in Louisiana. The killing, if done in Mississippi, would have been justifiable. Query: Was it justifiable in Louisiana? If not, what is the grade of the offense? Cite authorities. J. B. S.

QUERIES ANSWERED.

QUERY NO. 21 [*25 Cent. L. J. 383.*]

A, in 1886, owned 160 acres of land in Missouri. He had four children. Three of them joined in a quitclaim deed to the fourth, before A's death, quitclaiming all their right, title and interest that they have *or might* have in the 160 acres belonging to their father. A died, seized of the land. Would the quitclaim deed estop the heirs or their descendants from claiming any interest in the 160 acres? Cite authorities. B.

Answer. We consider the language used to refer only to present title, and that the deed is merely a quitclaim. A quitclaim deed does not estop the grantors from asserting an after-acquired title. Smith v. Washington, 80 Mo. 475. H.

RECENT PUBLICATIONS.

THE AMERICAN DECISIONS, Containing the Cases of General Value and Authority Decided by the Courts of the Several States from the Earliest Issue of the States Reports to the Year 1869. Compiled and Annotated by A. C. Freeman, Counselor at Law, and Author of "Treatises on the Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc. Vols. XC. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1887.

We have now before us the ninetieth volume of the American Decisions and are very much at a loss what to say about it. The enterprise of the publishers has furnished the professsion with these volumes in such rapid succession, and we have noted their advent so frequently of late, that we can do little or nothing more for this volume than to refer to our notices of its predecessors. Indeed, an examination of it demonstates that we can say nothing less in its favor than we have already said in behalf of its elder bretheren. We may remark however, that as the series approaches the period limited for its conclusion, the cases embodied in it discuss many topics which have of late years "come to the front," and which appeared rarely or not at all in the older reports. In this point of view, as in some others, these volumes become more available the nearer the cases reported come down to our own time. We need hardly add that the learned editor has done his work well, and that in typographical execution, the volume is superior to all exception.

JETSAM AND FLOTSAM.

A LEGAL ORNAMENT — NO FAMILY SHOULD BE WITHOUT IT.—"My ma has put a coat of varnish on all our furniture," bragged a little boy to his comrade on the street.

"Shucks! that's nuthin," retorted the other in disdain, "My pa is a-goin to put a chattle mortgage on all of ourn."

A PERIPATETIC JUSTICE.—Constable Hefferman went to arrest James Walker, of Eldersile, who keeps a groggery on the roadside, five miles from Chesley. James took to the woods, and Patrick took after him. After a hot chase James surrendered, and was lugged along to the roadside, where police magistrate Vanstone sat in his buggy, calmly viewing the race. His Worship tried him on the spot, convicted him without the right of appeal, and fined him fifty dollars and costs. It is a great convenience to delinquents, thus to keep a traveling court.